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IN THE

Supreme Court of the United States

ARDIE R. MILES and ED BROWN, individually and as deacons, trustees and members of Ebenezer Baptist Church, Inc., and EBENEZER BAPTIST CHURCH, Inc.,

Plaintiffs-Respondents,

against

ANDERSON W. WILSON, individually and as Pastor of Ebenezer Baptist Church, Inc.,

Defendant-Appellant.

Petition for a Writ of Certiorari to the United States Supreme Court.

SNITOW & SNITOW,
Attorneys for Petitioner,
152 West 42nd Street,
New York, N. Y.

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IN THE

Supreme Court of the United States

ARBIE R. MIL[illegible] and ED BROWN, individually and as deacons, trustees and members of Ebenezer Baptist Church, Inc., and EBENEZER BAPTIST CHURCH, Inc.,

Plaintiffs-Respondents,

against

ANDERSON W. WILSON, individually and as Pastor of Ebenezer Baptist Church, Inc.,

Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT.

Petitioner, Rev. Anderson W. Wilson, individually and described as pastor of the Ebenezer Baptist Church, the spiritual body, prays for a writ of certiorari to review the judgment of the New York Court of Appeals entered in the above captioned case on November 13, 1958, and the remittitur amended on January 15, 1959.

Opinions Below.

The opinion of the New York Court of Appeals is reported at 5 N. Y. 2d 822.

The opinion of the Appellate Division, Second Department, is reported at (fols. 2215 to 2223) 6 App. Div. 2d 898. The opinion of the Supreme Court, Kings County, is found at folios 88 to 123.

Jurisdiction.

The judgment of the New York Court of Appeals was entered on November 13, 1958 (R. Page to 37). A motion for rehearing was denied, and the remittitur was amended on January 15, 1959. The jurisdiction of this Court is invoked under Sections 237 thru 240, U. S. J. C.

Questions Presented.

The questions presented are whether civil courts have power or jurisdiction, without permission of the church, not a party to action, to interfere in matters of spiritual concern, such as removing petitioner, a minister, from his pulpit, excommunicating 14 out of 24 members of a Baptist Church, and disqualifying these 14 members of a Baptist Church from their right to vote on an ecclesiastical question, the removal or retention of the minister of their church; depriving petitioner, a minister, of his pulpit, after the highest judicatory in the church had voted to retain him, and to retain him under his lifetime contract with the spiritual body; depriving the highest judicatory, the Ebenezer Baptist Church, the spiritual body, an unincorporated association, not a party to the action, of their pastor, without its permission or consent; refusing to accept, and then overruling the decision of the highest judicatory, who had voted to retain its pastor, the petitioner; refusing to obey the stipulation of settlement herein wherein it was implicit, that the qualifications of the members of the spiritual body, who were to vote on the two questions to be submitted, were to be determined by church law, not by civil law.

Statutes Involved.

The pertinent provisions of the First Amendment to the United States Constitution, Fourteenth Amendment to the

United States Constitution, Section 3 of the Article I of the New York State Constitution, Section 5, Section 25, Section 139 of the Religious Corporation Laws of the State of New York, Sections 12 and 13 of the General Association Law of the State of New York, are set forth in an appendix, *infra*, pages 31 to 33.

Statement.

The petitioner has been the pastor of the Ebenezer Baptist Church, the spiritual body, not a party to this action, since 1938, when the ecclesiastical body, through its membership called him as its pastor, at a duly called and held church meeting, and the petitioner thereafter accepted the call. After serving for many years, the congregation honored the petitioner, by giving him a lifetime contract of employment (see Plaintiff's Exhibit 9 in evidence, fols. 2107-2109). On August 14th, 1957, at which time the petitioner was in his 19th year of service, as the minister of the said church, two of the deacons, Arbie R. Miles and Ed Brown, decided to take over the control of the church, and without the knowledge, permission or consent of the church, they had a corporate meeting, called for September 10th, 1957, for the purposes of having the "members of the corporation" vote to remove petitioner.

This meeting was illegally called and held, because the petitioner is an officer of the church, the spiritual body, and not an officer of the corporation, and he could only be removed, by the membership of the ecclesiastical body, and not by the membership of the corporate body. The distinction between the members of the ecclesiastical body, and the members of the corporate body, was very ably demonstrated by the Court of Appeals of the State of New York in the case of *Walker Memorial Baptist Church v. Saunders*, 285 N. Y. 462.

Nevertheless, the membership of the corporation then present, on September 10th, 1957, by a vote of 37 to 4, voted that the charges were unsubstantiated, and were rejected, and the motion was tabled to remove the petitioner (see fols. 3170 thru 3178).

In spite of that fact, Arbie R. Miles and Ed Brown started an action in the Supreme Court, Kings County, for a permanent injunction, and this case went to trial before Special Referee Steinbrink, on a complaint, which alleged that the "membership of the corporation" had voted to discharge petitioner as the pastor of the church, on September 10th, 1957, for which they sought a permanent injunction against the petitioner (see fols. 15-17) to restrain him from preaching or being the pastor of the plaintiff corporation.

An answer was interposed by petitioner with four affirmative defenses, and it was alleged that the Court had no jurisdiction, because the Ebenezer Baptist Church, the spiritual body, was neither a plaintiff nor a defendant herein, nor was any demand made upon the Ebenezer Baptist Church, the spiritual body, to bring this action, which was refused, nor was any authority given to the plaintiffs to institute the action (see fol. 27). That as a second affirmative defense, the Court has not and should not take jurisdiction over the cause of action herein, because it was purely an ecclesiastical matter (fol. 28). That the plaintiffs have an adequate remedy at law, and that petitioner had a lifetime contract of employment, which was then in full force and effect, had never been cancelled or rescinded, and that pursuant to its terms, the petitioner was and still is the pastor of the Ebenezer Baptist Church, the spiritual body (fols. 29 and 30), the very same constitutional questions raised later in the Appellate Division, Court of Appeals and now in this court.

The case came to trial and Judge Steinbrink overruled the affirmative defenses (fols. 166-168), and after hearing a short witness, it was apparent that the complaint did not state a cause of action, in the light of the holding of the Court of Appeals of the State of New York, in *Walker Memorial Baptist Church v. Saunders, supra,* which specifically held that the "members of the corporation," had no power to remove a minister, an ecclesiastical officer, and Judge Steinbrink asked the attorneys to enter into a stipulation of settlement (fols. 173-198), instead of dismissing the complaint.

A stipulation of settlement was entered into, in which it was provided that there was to be a new meeting, at which the members of the church, not a party to the action, would be permitted to vote and determine two questions.

1. "Do you desire or rescind life tenure of pastor, Anderson W. Wilson?"

2. "Do you desire that the services of pastor, Anderson W. Wilson be terminated?" (fols. 2122 thru 2124).

That the meeting held under the supervision of the Honest Ballot Association, the petitioner won on both questions by a vote of 55 to 44 (fols. 2116 thru 2124).

Plaintiffs challenged 24 of the 55 members who voted in favor of the petitioner, claiming that they were under age, in spite of the fact that many children voted against the petitioner, without objection (fols. 2116 thru 2124).

At this point, it was the duty of the Trial Court, pursuant to the stipulation of settlement hereinabove referred to, to have the membership of the spiritual body, not a party to the action, decide whether these 24 challenged voters were or were not members of the church, and were or were not entitled to vote on the two questions.

Instead of doing that on the plaintiffs' motion, the Special Term ordered a trial to be held and took testimony for seven days (fols. 199 thru 1975), on these two questions, in violation of the stipulation of settlement (173-198) and in violation of the constitutional rights of the defendant, and of the Ebenezer Baptist Church, the spiritual body, not a party to the action, and excommunicated 14 out of 24.

Practically, all of the 24 challenged voters testified that they were members of the church, that they had never been dismissed or removed as members of the church, and that they had voted in favor of Rev. Wilson, on both questions (see pages 139 thru 141, 440 thru 442, 430 thru 432, 243 thru 249, 171 thru 175, 310 thru 316, 299 thru 309, 216, 217, 134, 226 thru 234, 613, 648, 235 to 243, 446 thru 463, 135, 425, 426, 344 thru 346, 470 and 471, 185 thru 191, 327 thru 329, 268 thru 271, 204 thru 208, 216 thru 267, and 210 to 216.

Not only did these 24 people testify that they were members, and had voted in favor of Rev. Wilson, but the records of the church, offered in evidence, by both the plaintiffs and the defendant, showed that all 24 were church members (see Plaintiffs' Exhibit 8 for identification, fols. 2063, 2064; Plaintiffs' Exhibit 9 in evidence, fols. 2074 to 2106, 2128 to 2130; Defendant's Exhibit L in evidence, fols. 2137 thru 2142; Defendant's Exhibit M for identification, fols. 2146 through 2148; Defendant's Exhibit N for identification, fols. 2152 thru 2154.

On December 19th, 1957, the Special Referee wrote his decision and findings, in which he ruled that 14 of the 24 challenged ballots were not members, because they weren't old enough to understand the questions, and some without giving any reason, took away their ecclesiastical right to vote, and thus excommunicated them, and as a result, the Special Referee changed the vote of the highest

judicatory, from 55 to 44 in favor of petitioner, to 44 against petitioner, to 40 in his favor (see fols. 88 thru 123, and the judgment entered thereon, by the Special Referee, fols. 124 thru 150).

Reasons for the Writ.

By the judgment sought to be appealed from, a civil court has in effect excommunicated 14 out of 24 members of a Baptist Church and prevented them from voting on the retention or dismissal of their pastor in violation of a settlement agreement, and their constitutional rights. A civil court has also removed a Baptist minister from his pulpit in violation of a stipulation of settlement, without the knowledge, permission or consent of the Ebenezer Baptist Church, the spiritual body, an unincorporated association, not a party to the action, and the other signatory to petitioner's lifetime contract.

If this judgment of the Court of Appeals is permitted to stand, the separation between church and state in this country is at an end.

That the constitutional questions raised herein are substantial ones, and the writ of certiorari should be granted (see U. S. Judicial Code, Sections 237 thru 240; *Wabash Railway Co. v. Flanagan*, 192 U. S. 29; *Roe v. Kansas*, 278 U. S. 191; *Burke v. Oregon*, 269 U. S. 811).

The test of substantiality, cannot, of course be marked out with mechanical precision. The test in the words of this Court, is whether the contention raised is:

> "So clearly not debatable and utterly lacking in merit, as to require dismissal for want of substance."

See:

Hamilton v. Regents, 293 U. S. 245.

See:

Wabash Railway Co. v. Flanagan, supra.

"The federal question asserted * * * is manifestly lacking in all color of merits."

Roe v. Kansas, supra.

"The alleged grounds are so lacking in substance, that they may properly be designated as frivolous.

"The question need not necessarily be one meriting reversal to be substantial." (See *Matter of Devega v. N. Y. State Labor Relations Board,* 281 N. Y. 13, 19.)

In that regard, Chief Judge Conway of the Court of Appeals, granted a seven-day stay, pending application of writ of certiorari, to this Court, on February 14th, 1959. and a motion for a stay of the enforcement of payment of cost judgments in the courts below, pending the writ of certiorari, was denied by Mr. Justice Harlan on February 20, 1959.

In granting the motion to amend the remittitur, in this case on January 15, 1959, the Court of Appeals said, that it had considered the petitioner's contention that the judgment violated the First Amendment of the United States Constitution, but that it considered the question insubstantial.

In the *Matter of the New York State Labor Relations Board v. Bethlehem Steel Co.,* 295 N. Y. 601, the question of substantiality had previously been decided by the Court of Appeals and denied, but that the question was nevertheless substantial, was confirmed, when this Court reversed, 330 U. S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026.

LAW ON THE CONSTITUTIONAL QUESTIONS.

POINT I.

By the judgment sought to be appealed from, the civil courts have excommunicated 14 out of 24 members of a Baptist Church and deprived them of voting in favor of retaining their pastor.

This is unconstitutional. No one, but the church, may excommunicate these 14 church members.

In *Watson v. Jones*, 80 U. S. 679, at page 730, this Court said:

> "The structure of our government, has, for preservation of civil liberty, rescued the temporal institutions from religious interference. *On the other hand, it has secured religious liberty from the invasion of the civil authority.*"

The Special Referee who wrote the decision and findings, which is the basis of this appeal (fols. 88 thru 120) in the case of *Rector v. Melish*, 194 Misc. 1006, took note of the above quotes by this Court, and on page 1016, Judge Steinbrink wrote:

> "If ever we depart from this, it would be a sorry day for America, for then the basic principle of the separation of church and state will be at an end."

Strangely enough, the man who wrote those words, wrote the judgment in this case, which has been affirmed by the Appellate Division, with the dissenting opinion (see Exhibit E, *infra*) by the Chief Justice of the Appellate Division, Second Department (fols. 2215 thru 2222), and affirmed by the New York State Court of Appeals, unanimously, and yet the judgment represents a very serious and very real invasion by the civil authority against religious liberty, not only of this church, but every church

in America that is run by the majority of its membership, as the highest ecclesiastical judicatory.

The invasion of the civil authority into religious liberty comes about in this way. Basically, this case involves the legality of the removal of a minister in a Baptist Church, the Ebenezer Baptist Church, Inc., a religious corporation of the State of New York. This petitioner, that minister, had not only the usual call, from the membership of the spiritual body, but in addition to that he had a lifetime contract (fols. 2107-2109) from the Ebenezer Baptist Church, the spiritual body, not a party to this action, an unincorporated association.

Instead of removing the petitioner, pursuant to the laws of the Baptist Church, Judge Steinbrink removed him, pursuant to civil law, to wit, the Corporation Law of the State of New York.

The second basic issue in this case is, may a Civil Court excommunicate 24 member of the Ebenezer Baptist Church, the spiritual body, of their membership in the church, and their right to vote as members on ecclesiastical questions.

Instead of letting the church decide the question of the membership of these 24 people, in accordance with the laws of the church, and their right to vote, in accordance with the law of the church, Judge Steinbrink decided, in effect, to excommunicate them, pursuant to civil law, to wit, the Religious Corporations Law of the State of New York (Sec. 134).

Generally it would appear that Civil Courts will not interfere in the administration of church affairs, and the determination of ecclesiastical questions, where the particular church is governed by a central governing body, such as the Pope in the Catholic Church, or the Presiding Bishop in the Protestant Episcopal Church, but the moment that

Civil Courts come in contact with those churches governed by the majority of their membership, as the highest judicatory in the church, then the Civil Courts lose sight of the Constitution, intervene, and take upon itself, the right to determine church administration, and church ecclesiastical questions.

For example, take Judge Steinbrink, and let us compare his decisions first in a case, with a central governing body, such as *Rector v. Melish*, 194 Misc. 1006, with his decision in this case, where the church is governed by the majority of its members in the spiritual body.

Dr. Melish was the minister of a Protestant Church, which is governed by a Presiding Bishop, and the case involved the legality of his removal.

Judge Steinbrink, in upholding the removal of Dr. Melish, ruled that the removal of a pastor is strictly ecclesiastical, and he cited the following cases and statutes, in support of that proposition:

1. *Connitt v. Reformed Church*, 54 N. Y. 551, 560, 561.
2. *Watson v. Jones*, 80 U. S. 679.
3. *United States Constitution*, First Amendment.
4. *Baxter v. McDonald*, 155 N. Y. 83.
5. *Moyle v. Franz*, 267 App. Div. 423-427.
6. *Newman v. Gibbons*, 253 App. Div. 837.
7. *SS & B Live Poultry v. Kashruth Association*, 158 Misc. 358.

On page 1018, Judge Steinbrink quotes from the dissent of Mr. Justice Carswell in *Moyle v. Franz, supra*, on a different ground, at page 427 as follows:

> "To insure unimpaired the integrity of this principal, courts will not inquire into or concern them-

selves, directly or indirectly, with conflicting contentions, relating to the practice or to the administration of the doctrinal affairs of the religious groups, or the merits of or grounds for the imposition of discipline, for claimed violations of duties, owing to a religious group, by a member thereof."

It seems strange that Mr. Justice Steinbrink didn't think of this quote by Mr. Justice Carswell, when the question of the excommunication of the 24 members arose, and the right to vote of these 24 members came before him. Instead, the Referee, in total disregard of the constitutional rights of the pastor, the church, and these 24 church members, excommunicated them in the following language at folios 1998-1999 and in total disregard of the law laid down by the Court of Appeals in *Walker Memorial Baptist Church v. Saunders*, 285 N. Y. 462, which is demonstrated very forcibly by the Referee's opinion at folios 1998-1999, as aforesaid:

> "The thing that the defendant seems to rely upon with respect to some of these matters is not at all contained in the body of the provision with regard to church membership, but rather as a footnote which Hiscox himself makes to what he has written, namely, Note No. 14, on page 79, where he says that they all have equal rights and immunities, without distinction of sex, age or condition. That may very well be with regard to worship, *but I absolutely decline to hold that that applies to elections or voting such as we have had in this case*, for the very simple reason as I have already pointed out that some of these children were of very low order of intelligence and didn't even know the meaning of the words on the ballots on which they pretended to vote." (Italics ours.)

Judge Steinbrink had settled the case (fols. 172 thru 198) and pursuant to the stipulation of settlement in the election run, under the supervision of the Honest Ballot Association, the petitioner had won by a vote of 55 to 44.

When the respondents lost, and they raised conflicting contentions with regard to 24 of the 55 ballots, the law is clear that it was for the spiritual body to determine the conflict.

If Civil Courts, under the First Amendment of the Constitution, have no right to interfere in the ecclesiastical affairs of the church, does the fact that a settlement was made between the petitioner, a minister, and the plaintiffs as church officer, and the church corporation, give a Civil Court greater powers to interfere in church administration, than it had before the settlement was entered into.

It is quite clear that the settlement agreement could not, and did not, give the Trial Court the right to violate either the First or Fourteenth Amendment of the United States Constitution. The Referee undoubtedly realized this ruling was unconstitutional for he admitted that there was no superior body to ecclesiastical body in his opinion at page 668 (fol. 1997):

> "With reference to the body of some of the things stated by Hiscox, it may well be that what he stated were his opinions which should govern these Baptist churches, each one of which is autonomous. They are on congregational lines, the same as the Protestant Episcopal Church and the same as Synagogues of the Jewish Faith. There is nothing above them to control or guide them, excepting the Almighty God."

In *Rector v. Melish*, 3 N. Y. 2d 476, the Court of Appeals indicated that the election and dismissal of a minister was an ecclesiastical matter, that the law of the church, rather than civil statute law, must under our Federal Constitution, First Amendment, be controlling, and the Court of Appeals cited the cases of *Watson v. Jones*, 13 Wall. U. S. 679; *Fiske v. Beatty*, 206 App. Div. 349, 238 N. Y. 598; *Kedroff v. St. Nicholas Cathedral*, 302 N. Y. 133; re-

versed 344 U. S. 94; 344 U. S. 143; *People ex rel. Peck v. Connolly*, 42 Hun 91.

Yet in this case, involving the very same proposition, but only in a different type of church organization, no central governing body, the highest judicatory being the majority of the members of the spritual body, the Trial Court, Appellate Division, and the Court of Appeals in effect invaded the ecclesiastical authority, and deprived the petitioner of his religious liberty, to wit, the right to practice his profession, under the original call and his lifetime contract of employment, all without the consent of the Ebenezer Baptist Church, the spiritual body, not a party to the action, and the other only signatory to the lifetime contract of employment with the petitioner (fols. 2107-2109) and all in violation of settlement agreement, as aforesaid (fols. 173-198).

In *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 143, in reversing the Court of Appeals, Mr. Justice Reed points out on page 151, that *Watson v. Jones*, 80 U. S. 679, has been considered in subsequent national and state litigation, in the following cases, and is still the law of the land:

1. *Sheppard v. Barclay*, 247 U. S. 1.
2. *Barclay v. Hayes*, 208 Fed. 319, 326.
3. *McGinnis v. Watson*, 41 Penn. 9.
4. *State of Missouri ex rel. Watson v. Farris*, 45 Miss. 183, 197, 198.
5. *First Lutheran Church v. Angelical Church*, 135 Fed. 701.
6. *German Reformed Church v. Commonwealth ex rel. Serbert*, 3 Penn. 382.
7. *Gibson v. Armstrong*, 7 B. Mon. Ky. 481.

In the *Kedroff* case, Mr. Justice Reed refers to the case of *Gonzales v. Roman Catholic Archbishop of Manila*, 280 U. S. 1:

> "Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of the Chaplain are, and whether the candidate possess them. In the absence of fraud, perusion or arbitrariness, the decision of a proper church tribunal, on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation, before the secular courts as conclusive, because the parties in interest made them so, by contract or otherwise. In the like circumstances, effect is given in the court to determinations of the judicatory bodies established by clubs and social associations."

When the respondents challenged the qualifications of the 24 of the 55 people who voted for petitioner, as appears by the above quote, it was the function of the church authorities, to wit, the membership of the spiritual body to determine whether these 24 people were members, and whether they had the right to vote.

If those questions had been sent back to them, and they had made a decision, then, in the absence of fraud, collusion or arbitrariness, the decision of the proper church tribunal, on matters purely ecclesiastical, although affecting civil rights are accepted in litigation, before the secular Court, as conclusive, because the parties in interest made them so, by contract.

This case never got that far, because instead of submitting that question of the spiritual body, Judge Steinbrink conducted a seven-day trial, and he made the determination, and he substituted his judgment, particularly with regard to the children, church members, for the only judgment that really counted in this case, to wit, the highest judicatory in this church, the majority of the members of the spiritual body.

There clearly, then, is the invasion by the civil authorities of the ecclesiastical and religious liberty of this petitioner, and the Ebenezer Baptist Church, the spiritual body, not a party to this action, and the 24 challenged members, who the civil court excommunicated from their church, by this judgment.

In *Rector v. Melish*, 3 N. Y. 2d 476, at page 483, Judge Desmond refers to Section 25 of the Religious Corporations Law, indicating it was applicable to all religious groups, and which states:

> "No provision of this Act authorizes the calling, settlement, dismissal or removal of a minister—and a meeting of a church corporation for any such purpose shall be called, held, moderated, conducted, governed and notice of such meeting given and person to reside thereat ascertained *and the qualification of voters thereat determined*, not as required by any provision of this act, but only according to the aforesaid laws and regulations, practice, discipline, rules and usages of the religious denomination or ecclesiastical governing body, if any, with which the church corporation is connected." (Italics ours.)

Therefore, it is quite clear that the judgment in question, not only excommunicated from their church these 24 challenged church members, in violation of the First Amendment of the United States Constitution, and Section 1, Article 3 of the New York State Constitution, but is also in violation of Section 25 of the Religious Corporations Law of the State of New York, indicates the legislative intent precisely as this Court indicated the law to be in the above quote in *Gonzales v. Roman Catholic Archbishop of Manila, supra*, to wit, that a minister is an ecclesiastical officer and could not be removed by a civil court, a church corporation, but only the spiritual body.

There is another substantial constitutional question that arises out of the foregoing fact and that is that the Ebenezer Baptist Church, the spiritual body, not a party to this action, is being deprived under this judgment of its pastor, pursuant to the original call and pursuant to the lifetime contract without due process of law and without its permission, knowledge or consent.

Under Sections 12 and 13 of the General Associations Law of the State of New York, the Ebenezer Baptist Church, the spiritual body, being an unincorporated association, was entitled to be either a plaintiff or a defendant in this case, and the failure to make it either a plaintiff or a defendant amounts to a deprivation of its property without due process of law in violation of the Fourteenth Amendment of the United States Constitution.

In *Walker Memorial Baptist Church v. Saunders*, 285 N. Y. 462, 471, 472, page 470:

> "It was further testified that under the customs, practices and usages of the Baptist Faith, there is a clear cut distinction between the spiritual body and the incorporated church. The spiritual body is of ancient origin, recognizing and following the laws and precepts of the New Testament. The spiritual body has two classes of officers, the pastor and the deacons. The pastor is the chief spiritual officer, having direct charge of the spiritual matters of preaching and teaching and the general spiritual oversight of the members of the congregation. The deacons are elected by the spiritual body, and assist the pastor in the discharge of his duties.
>
> "It was further testified that should the church wish to discharge the minister, the matter must originate in the board of deacons and that 'a church meeting' the only body that can handle such matters, would have to pass upon such discharge. It is not the practice in any church for a corporate meeting to pass upon such charges."

On page 472:

> "It is undisputed that the Baptist Church has rules and regulations for the appointment of ministers, and since a minister is one who has authority to 'preside over and direct the spiritual affairs of the church,' there cannot be any sound basis for the conclusion that the minister of a Baptist church is an officer of the legal entity, which is given control only of the temporalities of the church, which conclusion would be exactly contrary to the rules and regulations by which the church considers itself governed. It follows that the minister of a Baptist church, under the rules and regulations of that denomination, is an officer of the religious society of the church and is not an officer of the religious corporation. This distinction between the church as a religious society and the church as a religious corporation has long been recognized and clearly formulated by the previous decisions. (*Petty v. Tooker*, 21 N. Y. 276; *People ex rel. Dilcher v. German United Evangelical St. Stephen's Church*, 53 N. Y. 103; *Landers v. Frank Street Methodist Episcopal Church*, 114 N. Y. 626; *Bristor v. Burr*, 120 N. Y. 427; *Westminster Presbyterian Church v. Trustees of Presbytery of New York*, 211 N. Y. 214; *Fiske v. Beatty*, 206 App. Div. 349; aff'd 238 N. Y. 598.) It follows, therefore, that the plaintiff corporation had no power to discharge the defendant, the Rev. Mr. Saunders, from his position as minister of the Walker Memorial Baptist Church."

Not only does the caption of this action indicate that petitioner was sued individually and as pastor of the Ebenezer Baptist Church, Inc., of which he was not the pastor, but the complaint alleges in paragraphs Fifth and Sixth thereof that he was removed by the membership of the corporation on September 10, 1957 (fols. 15 thru 17), which clearly was in violation of the law laid down by the Court of Appeals as above quoted.

Therefore, the only thing left in the case, was the stipulation of settlement above referred to, and it has been amply demonstrated that the Trial Court invaded the ecclesiastical administration, and deprived the highest judicatory of this church, of its constitutional right to determine the controversy with regard to the 24 challenged voters, and the Civil Court having usurped that right, it is clear that there has been a very serious constitutional deprivation of the petitioner's rights under the First Amendment of the United States Constitution.

With regard to the second basic question of the excommunication of these 24 members by the Trial Court, and their deprivation of the right to vote so as to change the results of the balloting conducted by the Honest Ballot Association from 55 to 44 in favor of the petitioner to 44 to 40 against the petitioner, that question has been settled a long time ago, and it has been definitely established that the question of church membership is purely ecclesiastical, and solely within the jurisdiction of the ecclesiastical authorities of the church, and no civil right is involved in a claim to be regarded as communicant of a particular church. (See *McGuire v. The Trustees*, 54 Hun 207, 7 N. Y. S. 45; *Waller v. Howell*, 20 Misc. 236; *Holcombe v. Leavitt*, 124 N. Y. S. 980.)

In *Waller v. Howell, supra*, the Court stated the law at page 238 to be as follows:

> "The question whether a right of membership and communion in the church is a civil right has been directly adjudicated. In *McGuire v. St. Patrick's Cathedral*, 54 Hun 207, it was held that the question as to whether an individual was in communion with the church was one over which the church itself had exclusive jurisdiction. Mr. Justice Barrett said: 'In my judgment, McGuire contracted for the exclusive jurisdiction of the church with regard to the question of communion. *Spiritual questions are*

solely for the determination of the church authorities. Over their action in the domain of church discipline or excision the civil courts exercise no advisory power. To attempt to exercise jurisdiction in such matters upon the plea of want of jurisdiction in the church authorities of first instance, would be the entering wedge whereby the symmetry of our governmental system with regard to church and state might readily be destroyed.' Mr. Justice Van Brunt said: 'Under our form of government we do not think that courts can be called upon to compel churches to administer religious rites to persons claiming to be its members, or perform any act in any way impressed with that character.' In that case the right of burial in a lot purchased by the deceased was refused, and no civil right was considered to be involved in the question of communion upon which the right of burial depended." (Italics ours.)

In *Shannon v. Frost*, 3 B. Monroe 253, the Court in discussing this subject said:

"This court, having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline. Our only judicial power when the case arises from the conflicting claims of the parties to the church, the conflicting claims of the property, and the use of it. *We cannot decide who ought to be members of the church, nor whether the ex-communicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church. We must take the fact of expulsion, as conclusive proof that the persons expelled, are not now members of the repudiating church; for, whether right or wrong, the act of excommunication must, as to the fact of membership, be law to this court. The judicial eye of the civil authority of this land having religious liberty, cannot penetrate the veil of the church, nor can the arm of this Court either rend or touch that veil for the forbidden purpose of vindicating the alleged wrongs of the excinded members.* When they became members, they did so

on the condition of continuing as themselves and their church might determine. In that respect they voluntarily submitted themselves to the ecclesiastical power, and cannot invoke the supervision or control of that jurisdiction by this or any other civil tribunal." (Italics ours.)

In *Dwenger v. Geary*, 113 Indiana 106, the Court said:

"No power, save that of the church, can rightfully declare who is a Catholic. The question is purely one of church government and discipline, and must be determined by the proper ecclesiastical authorities."

To the same effect see:

Diffendorf v. Reformed Calvanist Church, 20 Johns. 12;
Robertson v. Bullins, 11 N. Y. 243;
People v. The Church, 53 N. Y. 103;
Connitt v. Reformed Protestant Church, 54 N. Y. 551;
Richardson v. The Society, 58 N. Y. 187;
Chase v. Cheney, 58 Ill. 509;
German Reformed Church v. Siebert, 3 Pen. St. 282;
Fitzgerald v. Robinson, 112 Mass. 371.

The vote of 54 in favor of the petitioner and 44 against was the vote of the highest ecclesiastical body, the highest judicatory in the Ebenezer Baptist Church. The highest judicatory, in effect, certified their right to vote, and certified their membership by accepting and receiving the ballots of the 54 members and the 44 members (fols. 2116 thru 2124).

Whenever questions of discipline, or of faith, or of ecclesiastical rule, custom or law have been decided by the highest church judicatories, to which the matter has been carried, legal tribunals must accept such decisions as final, in their application to the cases before them. All questions of faith, doctrine and discipline, belong exclusively to the church and its spiritual officers, and the Court will

neither review their determination, on the facts, nor their decision on the question of jurisdiction. It is the settled law of this country, repeatedly announced by the most learned Judges and highest Courts, that in such cases, the civil courts must take the decision of the ecclesiastical courts, as final and binding upon the parties. (See *Watson v. Jones*, 80 U. S. 679; *Connitt v. Reformed Church, supra; Baxter v. McDonald, supra; Waller v. Howell, supra; Walker v. Wainwright*, 16 Barb. 486; *Rector v. Huntington*, 82 Hun 125.)

Not only could the Trial Court not excommunicate the 25 members challenged by the respondents, but not even could the Ebenezer Baptist Church, Inc., one of the respondents, have that right or power. Only the Ebenezer Baptist Church, the spiritual body, an unincorporated association, not a party to this action, had that power, and it has never removed petitioner as its pastor, or abrogated the lifetime contract of employment it gave him, and therefore the written judgment is unconstitutional and beyond the jurisdiction and power of the Court.

The Court of Appeals said in *Walker Memorial Baptist Church v. Saunders, supra*, at pages 472 and 473:

> "The question still remains whether the corporation could expel the other defendants from membership in the corporation. • • • Therefore, since all these defendants are members of the spiritual body of the church, it follows that the church corporation had no right to expel them from voting rights in the religious corporation."

Other states hold this to be the law also.

In *Golden v. Brooks*, 276 S. W. 2d 670, the Court of Appeals of Kentucky held (March 18, 1955) that all members of a Baptist church, regardless of age are entitled to vote at church society meetings, citing:

Randolph v. Mt. Zion Baptist Church, 53 Atlantic Report, 2d Series, 206, 19 Equity Report 605; and *Geter v. Walters*, 68 Atlantic Report 2d series, page 330; 5 New Jersey Superior 10.

In *Randolph v. Mt. Zion Baptist Church, supra*, at page 209 (May 1, 1947), it was held:

> "It is my conclusion that Mt. Zion has no rule or definite custom on the subject that until it shall adopt one the usual Baptist practice governs and all members can vote whether or not they are under age. * * *."

In *Geter v. Walters, supra*, the same rule was followed the Court further holding that since no attempt to enforce the rule concerning eligibility to vote had been made in the past in the New Hope Baptist Church, the rule which was invoked to preclude from voting those who failed to qualify under the unenforced rule, that such rule would not be put into effect for the first time in the contested vote, which was the subject of the controversy in court.

The Trial Court in excommunicating the challenged church members, particularly the children apparently relied on Section 134 of the Religious Corporations Law, but as the Court of Appeals pointed out in *Walker Memorial Baptist Church v. Saunders, supra*, at page 473:

> "Section 134 of Article 7 provides that 'At a corporate meeting of an incorporated Baptist Church, qualified votors shall be all persons of full age, who are then members of such church in good and regular standing by admission of the full communion of membership therewith, or others who have statedly worshiped with such church and have regularly contributed to the financial support thereof during the year next preceding such meeting.'"

But Baptist church law has indicated from time immemorial that once a child is extended the right hand of

fellowship, and becomes a member of the church, he or she *has the right to vote at all church meetings on all ecclesiastical matters.*

The Referee undoubtedly realized that he was using civil law to excommunicate 24 church members, and to oust a pastor because some of the 24 members were children, and while he professes not to rely on Article 7 of the Religious Corporation Law, he in fact relies upon it, in his opinion (fol. 2001):

> "Nothing that I say here is in contravention of other decisions with respect to the provisions of Article 7 of the Religious Corporations Law, because that refers only to property rights, temporal matters. But even there you have at least a hint from the Legislature of what they thought regarding the property matters, for it is provided that only those shall be entitled to vote who have attained their majority."

In that regard the bill of particulars that the plaintiff served in this case admits that this church was governed by Hiscox, "The New Directory for Baptist Churches" (fol. 56).

Page 79, note 14, of Hiscox, "New Directory for Baptist Churches"

> **"Note 14—Persons received for membership have equal right and immunities with any and all other members, without distinction of sex, age or condition, unless for cause under discipline and censure • • •"**

These 24 members testified at the trial that they were all members of the Ebenezer Baptist Church and had never been dismissed from membership (fols. 401, 402, 413, 414, 416, 421, 427, 512, 513, 541, 542, 556, 586, 616, 621, 631, 632, 648, 655, 657, 656, 678, 704, 705, 730, 731, 787 through 801, 805, 808, 983, 984, 1018, 1019, 1030, 1031,

1110 through 1119, 1275 through 1277, 1289 through 1291, 1319 through 1320, 1339 through 1340, 1410, 1411, 1581 through 1587, 1627 through 1629, 1646, 1647, 1943, 1944).

On page 80 of Hiscox, The New Directory for Baptist Churches,

> "There are three ways, according to the order, by either of which the relation of members to the body may be dissolved:
>
> "1. By letter. A member may, on application receive a letter of commendation and dismission from his church, with which to unite with another of the same faith, and thus, not pass out of church relations, but be transferred from one fellowship to another.
>
> "2. By exclusion. When the church, in the exercise of its local authority and discipline, withdraws fellowship from one proven to be an unworthy member, its connection with the body is dissolved and ceases.
>
> "3. By death. The death of members of course dissolves the relation, and transfers them from the church on earth to that above.
>
> "No other modes of dismission or disconnection are recognized among our churches."

On page 81 of Hiscox:

> "Note 7. No member can withdraw from the church. He must be regularly dismissed by the action of the body. Nor can one have his name dropped, or be excluded at his own request. Such action, if taken at all, must be taken by due process of discipline on the part of the church."

There was no testimony offered by the plaintiffs on this trial that any of these 24 challenged members have ever been dismissed from their membership by the affirmative action of the membership of the spiritual body, the highest judicatory, at any time.

To offset the Baptist Church Law, the respondents referred to by-laws, but in the light of their attorneys' admission at folio 161 that

"Mr. Ferziger: There are no by-laws"

in response to the Referee's question, by-laws never produced on the trial should be entirely disregarded.

Not only did these 24 members testify that they were members, but the books of the church showed that they were members. (See fols. 2062-2064, fols. 2074 through 2106, fols. 2137-2142, 2146 through 2148, 2152 through 2154.)

Hiscox, The New Baptist Church Directory, was approved as an authoritative Baptist Church guide by the Court of Appeals in *Walker Memorial Baptist Church v. Saunders, supra*, and the above quotes from Hiscox as to the methods membership in a Baptist church could be terminated, was adopted by the Court of Appeals at page 473:

> "That membership in a Baptist church may be terminated in three ways only, (1) by transfer, namely, by delivery of letter to another Baptist church, (2) by expulsion, when the offending member has violated this one of the church and the ecclesiastical body regards him as not fit for membership therein and (3) by death. Since termination of membership in a religious society by means of the first two of these methods must be by the religious body upon the recommendation of the Board of Deacons, the church corporation has no power to expel a church member from an ecclesiastical membership."

It is obvious that the Referee was not sure that his judgment would stand the test of constitutionality, because at folio 2000 he says:

> "I am regretful that this matter ever came before me"

and at folio 2004:

> "The Referee: Wilson is out from this time on. Wilson the judgment is submitted to me, I will stay voluntarily, though it hasn't been asked of me, my own judgment for thirty days in which the defendant may perfect an appeal, if he is so advised. Within the 30 day period, the provisions of the stipulation are still to be observed."

Also see folios 140 thru 143.

The Appellate Division, Second Department, possibly with the same thoughts in mind about constitutionality, granted the petitioner two stays, one on February 25, 1958, and one on April 25, 1958, all over vigorous opposition.

Likewise the Court of Appeals thru Judge Burke on September 2, 1958, prior to argument of the appeal in that court, granted a stay over vigorous opposition, and required the plaintiffs, among other things, not only to maintain the *status quo*, but also to restore the signs on the church building, which stated: "Ebenezer Baptist Church—Rev. A. Wilson, Pastor."

The Chief Judge of the Court of Appeals, after that Court had unanimously affirmed, without opinion, on November 13, 1958, judgment appealed from, granted a stay after oral argument, and hearing in connection with defendant's claim of unconstitutionality on the motion to amend the remittitur.

On January 15, 1959, the Court of Appeals, as aforesaid, amended the remittitur to show that it considered the First Amendment to the United States Constitution, although it held it to be unsubstantial.

On February 14, 1959, over vigorous opposition, and after hearing, Chief Judge Conway again, allowed a seven-day stay to make an application to this Court for a stay pending writ of certiorari, which was done and denied, as aforesaid by Judge Harlan on February 20, 1959.

CONCLUSION.

The writers urge upon this Court, very seriously the irresistible conclusion that unless this Court intends, by not disturbing the judgment below to end the doctrine of the separation of church and state in this country, and unless civil courts are prepared in the light of the judgment sought, to be appealed from, to take over the operation of all churches and synagogues administered by the majority of the membership of the congregation, throughout this country, that this Honorable Court hear the prayers of every Baptist and every Jew in this country and grant this writ of certiorari.

That this is no exaggerated appeal, let me remind the Court that since the Court of Appeals affirmed, and based thereon, Mr. Justice Morrissey in the Supreme Court, Kings County, granted a motion to punish ten church members, not even parties to the church, and not even served with process in the action solely because these 10 church members called a church meeting, pursuant to the law of the church.

The Chief Justice of the Appellate Division, Second Department, wrote a dissenting opinion, in which he raised with approval the very same constitutional questions as herein raised, and not only voted to reverse, but to dismiss the complaint (fols. 2215-2223). His opinion is incorporated herein verbatim (see Exhibit E).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

SNITOW & SNITOW,
Attorneys for the Petitioner.

SYDNEY SNITOW, Esq.,
and
MELVEL W. SNITOW, Esq.,
Of Counsel.

APPENDIX.

First Amendment, United States Constitution, U. S. C. A. Constitution, page 46:

> "Congress shall make no law respecting an establishing of religion or prohibiting the free exercise thereof * * *"

Article I, Section 3 of the New York State Constitution, provides as follows:

> "Section (3) (Freedom of Worship; religious liberty).
>
> "Free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State to all mankind; * * *."

Section 25 of the Religious Corporations Law is entitled Pastoral Relation:

> "Section 25. Pastoral Relation.
>
> "No provision in this chapter authorizes a calling, settlement, dismissal or removal of a minister, or the fixing or changing of salary, a meeting of the church corporation for any such purpose shall be called, held, moderated, conducted, governed and notice of such meeting be given and person to reside thereat ascertained and the qualification of voters thereat determined, not as required by any provision of this chapter, but only according to the aforesaid laws and regulations, practice, discipline, rules and usages of the religious denomination or ecclesiastical governing body, if any, with which the church corporation is connected."

Section 5 of the Religious Corporations Law provides as follows:

"Section 5. General powers and duties of trustees of religious corporations.

"The trustee of every religious corporation shall have the custody and control of all the temporalities and property, real and personal, belonging to the corporation and of the revenues therefrom, and shall administer the same in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject, and with the provisions of law relating thereto, * * *"

Section 139 of the Religious Corporations Law is as follows:

"Section 139. Control of trustees by corporate meetings of such churches; salary of minister. The Trustees of an incorporated Baptist church shall have no power to settle or remove a minister or to fix his salary or, without the consent of a corporate meeting, to incur debts beyond what is necessary for the administration of the temporal affairs of the church and for the care of the property of the corporation; or to fix or change the time, nature or order of the public or social worship of such church. * * *"

Section 12 of the General Associations Law of the State of New York is as follows:

"Section 12. Action or proceeding by unincorporated association.

"An action or special proceeding may be maintained, by the president or treasurer of an unincorporated association to recover any property, or upon any cause of action or upon which all the associates may maintain such an action for a special proceeding, by reason of their interest or own-

ership therein, either jointly or in common. An action may likewise be maintained by such president or treasurer to recover from one or more members of such association his or their proportionate share of any moneys lawfully expended by such association for the benefit of such associates, or to enforce any lawful claim of such association against such member or members."

"Section 13. Action or proceeding against unincorporated association. An action or special proceeding may be maintained, against the president or treasurer of such association, to recover any property, upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefore, either jointly or severally. Any partnership or other company or persons, which has a president or treasurer is deemed an association within the meaning of this section."

Exhibit A.

WESTERN UNION TELEGRAM

(52)

1958 Nov 13 PM 3 54

NA257 16 COLLECT=ALBANY NY 13 248PME=

SNITOW AND SNITOW=
152 WEST 42 ST=

MILES V WILSON JUDGMENT AFFIRMED WITH COSTS NO OPINION ALL CONCUR=

RAYMOND J CANNON
CLERK COURT OF APPEALS ALBANY NY=

Exhibit B.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York held at Court of Appeals Hall in the City of Albany on the fifteenth day of January A. D. 1959.

Present:

Hon. Albert Conway, Chief Judge, presiding.

Mo. No. 69

ABBIE R. MILES & *ano., individually and* as deacons, trustees and members of the Ebenezer Baptist Church, Inc.,
Respondents,

vs.

ANDERSON W. WILSON, as Pastor of the Ebenezer Baptist Church, Inc.,
Appellant.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there was presented an alleged constitutional question under the Constitution of the United States, viz: Appellant contended that the interference by the civil courts with the internal affairs of a religious body was a violation of the First Amendment. The Court of Appeals held that there was no such violation and that this question was insubstantial in view of the fact that appellant, by stipulation, had submitted to a membership vote the question of his retention in office as pastor.

AND the Supreme Court, Kings County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

(Seal)

Exhibit C.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the fifteenth day of January A. D. 1959.

Present:

Hon. Albert Conway, Chief Judge, presiding.

Mo. No. 55

ARBIE R. MILES & ano., individually and as deacons, trustees and members of the Ebenezer Baptist Church, Inc.,
Respondents,

vs.

ANDERSON W. WILSON, as Pastor of the Ebenezer Baptist Church, Inc.,
Appellant.

A motion for a re-argument of the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

GEARON KIMBALL
Deputy Clerk

(Seal)

Exhibit D.

SUPREME COURT OF THE UNITED STATES.

Before:

Honorable Albert Conway, Chief Judge, Court of Appeals, State of New York.

ARBIE B. MILES, *et al.*, individually and as deacons, trustees and members of Ebenezer Baptist Church, Inc.,
Respondents,
against
ANDERSON W. WILSON, individually and as pastor of the Ebenezer Baptist Church, Inc.,
Appellant.

Index No. 10898-1957.

An appeal having been taken to the Court of Appeals of the State of New York from a judgment of the Appellate Division, Second Department, entered August 28, 1958, affirming a judgment of the Supreme Court in favor of the plaintiffs, entered in Kings County, and upon such appeal said judgment having been affirmed by the Court of Appeals on November 13, 1958, counsel for defendant having applied for a stay of the proceedings herein, and a hearing having been had upon such application on February 13, 1959, and having heard argument at said hearing by Melvel W. Snitow, counsel for defendant, and Solomon Z. Ferziger, counsel for plaintiffs, and in order that defendant may have adequate opportunity to present an application for a stay of further proceedings herein for the enforcement of the judgment of affirmance, to a Justice of the Supreme Court of the United States,

IT IS HEREBY ORDERED that the judgment heretofore entered herein upon the order and remittitur of the Court of Appeals be, and it is hereby in all respects, stayed for seven (7) days from the date hereof;

AND IT IS FURTHER ORDERED that the stay granted hereby shall become inoperative and of no effect in any event immediately upon the expiration of seven (7) days from the date hereof, or upon the granting or denial of an application for a stay to a Justice of the Supreme Court of the United States;

AND IT IS FURTHER ORDERED that the original of this order be filed in the Office of the Clerk of Kings County, and that a certified copy hereof be served upon Solomon Z. Fersiger counsel for the plaintiffs, and upon Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

The application is, in all other respects, denied.

Dated at Brooklyn 1, New York, February 14, 1959.

(s) ALBERT CONWAY
Chief Judge of the Court of Appeals of
the State of New York

EXHIBIT E.

Opinion by the Appellate Division, Second Department.

By Nolan, P.J.; Wenzel, Beldock, Ughetta and Hallinan, JJ.:

Miles and ano., &c., res, v. Wilson, ap.—Appeal from a judgment entered after trial before a special referee enjoining appellant from continuing as pastor of the Ebenezer Baptist Church and from interfering in any way with its property, funds or worship and directing him to deliver up to the respondents the church books, papers and property in his possession.

Judgment affirmed, with costs. No opinion.

Wenzel, Beldock, Ughetta and Hallinan, JJ., concur.

Nolan, P. J., dissents and votes to reverse the judgment and to dismiss the complaint, with the following memorandum: Pursuant to the stipulation of the parties, the questions in dispute between appellant and respondents were to be settled at a meeting of the congregation. It was implicit in that stipulation that the qualifications of the members of the congregation who were to vote on the questions to be submitted were to be determined according to the church law recognized by, and the policies, customs, usages, rules and regulations of, the Ebenezer Baptist Church. No power to determine such questions, except in accordance with the law of the church, was reserved to the referee. It was established by the testimony of witnesses that according to ecclesiastical law, as recognized in the Ebenezer Church, and according to such rules and regulations, all members of the congregation were permitted to vote, without distinction because of sex, age or other condition. It was for the congregation to determine whether persons desiring to become members had sufficient capacity to understand matters of doctrine and other questions which might come before the congregation for determina-

tion. Once such persons were accepted as members, and even though they might appear to others, outside of the congregation, to lack qualification, they had equal rights with all other members. This appears to have been recognized by the parties with respect to those who voted against appellant on the questions submitted. It was error therefore for the learned referee to exclude the ballots of those who voted in favor of appellant and who appeared to be otherwise qualified, merely because they were not of full age or did not appear to him to have a sufficient understanding of the questions submitted. No reason was given by the learned referee for rejecting three ballots, nor have those who cast such ballots been identified. The ballots of Henry Wynne and Norma Mitchell appear to have been erroneously excluded because they were not of age. It does not appear whether the ballots of Barbara Stewart, Linda Stewart and Shirley Stewart were held to be invalid because of the fact that they were not of age, lacked comprehension of the nature of the dispute or were not members of the congregation on September 10, 1957. In my opinion the evidence established that they were such members on September 10, 1957, and that by reason of such membership they were entitled to vote pursuant to ecclesiastical law as recognized by the congregation. In addition, the evidence established that Edith Brown, Phyllis Blake and William Powell were all members of the congregation on that date and that they voted at the meeting in favor of appellant. No reason appears why their ballots should have been held to be invalid. There should have been added to the 31 unchallenged ballots in favor of appellant, the 7 challenged ballots found by the referee to be valid, the 3 unidentified ballots held to be invalid, for which no reason was given, and the 8 identified ballots hereinbefore referred to, which were held invalid. The result of the vote would then have been 44 against appellant and 49 in his favor, and, in accordance with the terms of the stipulation between the parties, the complaint should have been dismissed.

EXHIBIT F.

THE PEOPLE OF THE STATE OF NEW YORK

To Clerk of the Court of Appeals of the State of New York, Albany, New York,

GREETING:

WE COMMAND YOU, That all business and excuses being laid aside, you appear and attend before Honorable John M. Harlan, Judge of the United States Supreme Court at U. S. Supreme Court Building, Washington, D. C., on the to be submitted on or before April 14th, 1959. and at any adjourned date to testify and give evidence in a certain action now pending in the said Court, then and there to be tried between Arbie R. Miles, et ano etc., plaintiff and Anderson W. Wilson, etc., defendant on the part of the said Defendant and that you bring with you, and produce at the time and place aforesaid, a certain Produce the record on appeal, all briefs, all motion papers in support of the motion, and all papers in opposition to the motion. Orders on the motions, orders on the appeals, and the order granting motion to amend the remittitur. now in your custody, and all other deeds, evidences and writings, which you have in your custody or power, concerning the premises. And for a failure to attend, you will be deemed guilty to a contempt of Court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit Fifty Dollars in addition thereto.

WITNESS, Honorable John M. Harlan one of the Justices of said Court, at U. S. Supreme Court Building, Washington, D. C., the 28th day of March, 1959.

SNITOW & SNITOW
Attorneys for Defendant-Appellant
(Office and Post Office Address)
152 West 42nd Street
New York 36, New York

FILE COPY

No. 829

Supreme Court, U.S.
FILED
MAY 8 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

ARBIE R. MILES and ED BROWN, individually and as deacons, trustees and members of Ebenezer Baptist Church, Inc. and EBENEZER BAPTIST CHURCH, INC.,

Plaintiffs-Respondents,

—against—

ANDERSON W. WILSON, individually and as Pastor of Ebenezer Baptist Church, Inc.,

Defendant-Appellant.

BRIEF FOR ARBIE R. MILES and ED BROWN, etc. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SOLOMON Z. FERZIGER
Attorney for Plaintiffs-Respondents
16 Court Street
Brooklyn, New York

On the brief:
SOLOMON Z. FERZIGER
HERBERT H. PENSIG
BERNARD MEYERSON

Gank Press Inc., 82 Beekman St., N. Y.—BEekman 3-2005

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IN THE

Supreme Court of the United States

October Term, 1958

ARBIE R. MILES and ED BROWN, individually and as deacons, trustees and members of Ebenezer Baptist Church, Inc. and EBENEZER BAPTIST CHURCH, INC.,

Plaintiffs-Respondents,

—against—

ANDERSON W. WILSON, individually and as Pastor of Ebenezer Baptist Church, Inc.,

Defendant-Appellant.

BRIEF FOR ARBIE R. MILES and ED BROWN, etc. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

Opinion of Special Referee is not reported. Annexed hereto as Appendix "A", is a copy of the opinion of the Hon. MEIER STEINBRINK, Special Referee, which appears in the record below at pages 30 to 41. The opinion of the Appellate Division, Second Department is reported at 6 App. Div. 2d 898. The memorandum of affirmance by Court of Appeals is reported at 5 N. Y. 2d 822 and the memorandum opinion on the motion to amend the remittitur is reported at 5 N. Y. 2d 929.

(All figures in parentheses refer to folio numbers in record that was before Court of Appeals).

Jurisdiction

Petitioner contends that the jurisdiction involved herein is pursuant to Section 237 through 240 U. S. J. C.

It is respectfully submitted, however, that these sections do not cover a situation such as the instant case where a stipulation was entered into in open court and in the presence and with the consent of the defendant-appellant and his counsel, wherein it was agreed to submit the question of the defendant-appellant's retention in office to a vote of the congregation and in the same stipulation agreed to submit all and any points at issue, including passing upon the eligibility of the challenged voters to the very same Special Referee.

The learned Special Referee found as a matter of fact that these challenged voters were not members of the Church in accordance with the rules, by-laws, regulations and requirements of this church as to membership.

Jurisdiction, however, is not settled upon this learned Court since constitutional questions alleged to have been raised were not raised in the trial court, but were raised for the first time on appeal in the Appellate Division of the Supreme Court of the State of New York as a point in the Memorandum of Law.

This alleged constitutional question was not raised in the trial court and could not have been raised in the trial court by reason of the stipulation which was entered into in settlement of the entire proceeding. Annexed hereto as Appendix "B" is a copy of the stipulation which appears at folio 58.

The Court of Appeals of the State of New York followed these cases when it held herein (5 N. Y. 2d 929):

> "• • • Upon the appeal herein there was presented an alleged constitutional question under the Constitution of the United States, viz: Appellant contended that the interference by the civil courts with the internal affiars of a religious body was a violation of the First Amendment. *The Court of Appeals held that there was no such violation and that this question was insubstantial in view of the fact that appellant by stipulation had submitted to a membership vote the question of his retention in office as pastor.*" (Emphasis supplied)

Thus the Court of Appeals has held that petitioner has waived his right in the lower court to test the constitutional question and this court has ruled in previous decisions that it will respect such a finding.

In the case of *Pennsylvania Railroad Co.* v. *Illinois Birch Co.*, 297 U. S. 447. The opinion of Mr. Justice Butler contained the following at page 463:

> "• • • As the highest court of the State declined to consider them because not raised in the Circuit Court or presented to it in accordance with practice that was unquestionably well established and reasonable, this court is without jurisdiction to consider either of them. *Chicago, I. & L. R. Co.* v. *McGuire*, 196 U. S. 128, 131; *Hulbert* v. *Chicago*, 202 U. S. 275; *Cox* v. *Texas*, 202 U. S. 446, 452; *Louisville & Nashville R. Co.* v. *Woodford*, 234 U. S. 46, 51."

Questions Presented

1. Where a party and his attorney enter into a stipulation during trial, which stipulation by its terms dispose of the litigation, such party may not thereafter contend that the stipulation was illegal because it waived alleged and imaginative constitutional rights.

2. Where further proceedings to the litigation were required to be held in accordance with the terms of the stipulation entered into, and which further proceedings were held pursuant to the said stipulation and in accordance with the understanding of the parties to the stipulation and their counsel, petitioner-defendant-appellant may not now claim a lack of jurisdiction in the Special Referee because it waives alleged and imaginative constitutional rights.

3. A finding by the Special Referee that challenged members were not members of the congregation in accordance with the rules, by-laws, regulations and requirements of the church as to membership is not an excommunication of these non-members of the church where the Special Referee found, as a matter of fact, that by-laws did exist and that the by-laws were in books and records of the church in the possession of the petitioner-defendant-appellant and withheld by him, even though counsel for plaintiffs-respondents stated that there were no by-laws because the by-laws were in the possession of and unlawfully withheld by petitioner-defendant-appellant.

4. Having recognized the final judgment of the court below by the commencement of an action and proceeding to enforce alleged and claimed rights under said judgment,

the petitioner-defendant-appellant cannot use as one of the bases for his appeal that alleged and imaginative constitutional rights have been violated by the judgment from which he is appealing.

The Pleadings

The proceedings were commenced to enjoin the defendant from claiming to be Pastor of the Ebenezer Baptist Church at 1110 Herkimer Street, Brooklyn, New York, and other incidental relief, upon the ground that he had been discharged by majority vote at a special meeting called for that purpose (13-23).

The main part of the complaint is the allegation that on September 10, 1957, a special meeting of the members of the Ebenezer Baptist Church, Inc. was held on notice to the defendant who was present on the occasion and upon a majority vote of the membership the defendant Wilson was discharged as Pastor. The action of the membership is alleged to have been taken "pursuant to the custom and usage of Ebenezer Baptist Church, Inc." (15-17).

The complaint further alleged that the petitioner-defendant-appellant refused to relinquish his post or to turn over to the deacons of the church all the books, records and documents of his office as pastor which created confusion amongst the members with the result that the church suffered financially in revenue and spiritually in dwindling attendance (19) for all of which the plaintiffs had no adequate remedy at law (20).

The answer of the petitioner-defendant-appellant contained four separate defenses. The first defense alleged that there was a defect of necessary parties to the action

because of the fact that Ebenezer Baptist Church (the unincorporated body) was neither plaintiff nor defendant to the suit and that no demand had been made upon the Board of such unincorporated body to bring this action, and further, that it did not appear that any authority was given to the plaintiffs to institute the instant action (27).

The second defense alleged that the court had no jurisdiction over the subject matter because the same was purely an ecclesiastical matter (28).

The third defense claimed that plaintiffs had an adequate remedy at law.

The fourth and final defense alleged that the defendant had received lifetime tenure by a resolution adopted by the Ebenezer Baptist Church, Inc. on December 16, 1946 (29-30).

The defendant denied the allegations of the complaint, admitted the facts about the meeting, but alleged that the resolution to remove him did not come to a vote and a substitute motion was made to table the motion that would have declared the pulpit vacant.

The matter was referred to the Hon. Meier Steinbrink, Special Referee to hear and determine, upon the written stipulations of the parties and the order of Mr. Justice James S. Brown (125, 126). The trial had actually started on October 14, 1957 (151-171) *when a stipulation of settlement was entered into* (172).

That stipulation in part presently pertinent provided as follows (174); annexed hereto as Exhibit 2:

> *"Without conceding that the method and form used by the plaintiffs herein heretofore is improper*

and without recognizing the contention of the defendant that their form was improper and should have been used in another form, the parties agree that the following modus operandi shall be used to settle the dispute herein."

The stipulation also provided that new charges for the removal of the defendant, "the pastor of the church," would be made (175) and outlined what was to be done with such charges if the board of deacons entertained them (194-5). How such charges were to be handled, insofar as the membership was concerned, was stated as follows in the stipulation (186-190):

"(10) In the event that the meeting of the Church Society is called, that is, the meeting of the entire church body, and by majority vote the charges are not sustained, then in that event the matter shall be terminated and no further action shall be taken by any party and the pastor shall remain as heretofore.

"(11) In the event, however, that the membership sustains the charges and votes to terminate the relationship as pastor of the church, then and in that event the pastor stipulates and agrees that he will forthwith terminate the pastorate or at such other time, if any, fixed in the resolution.

* * * * *

"(13) It is further stipulated and agreed that the Court retains jurisdiction of this action and that in the event that it is necessary to interpret or enforce this stipulation or take any further action with reference to the case, then either party may apply to the Court upon three days notice to the other for such relief as to the Court may appear just and proper. (Emphasis supplied)

"(14) In the event a special stated meeting of the Church Society or congregation as a sequence of the steps hereinabove set forth is required, the representatives of the Honest Ballot Association shall be called in to supervise the vote taken at such meeting and the expense thereof shall be borne equally between the parties hereto. The certificate by the Honest Ballot Association as to the vote shall be binding upon the parties hereto.

"(15) The only persons entitled to vote at a meeting of the Board of Deacons or at a stated meeting of the Church Society or congregation shall be those members who were such on September 10, 1957. (Emphasis supplied)

"(16) Without conceding the allegation of the defendant herein that the defendant had heretofore received a life call from the congregation, before a vote may be taken upon the question of the termination or retention of the pastor as set forth hereinbefore, it shall be necessary that the resolution which the defendant alleges and claims was heretofore passed giving him life tenure shall be rescinded by a majority vote of the congregation." (Italics ours)

The stipulation contained other provisions which are of no consequence at present.

The vote was taken and the Honest Ballot Association reported that there were 75 unchallenged ballots and 23 challenged ballots (99).

The disposition of the case, therefore, fell to the Special Referee under the reservation of jurisdiction pursuant to paragraph 13 of the stipulation of settlement (188).

The defendants had challenged one vote on plaintiffs' side and during trial withdrew the challenge. The matter

then came on before the Special Referee who had testimony as to all challenged voters and sustained the challenge of 14 voters (102). The Special Referee referred to some of the persons who voted: "* * * As an attempt to stuff the ballot box" (106).

Statement

It is noted that in the within petition and in the papers submitted in the state courts, petitioner completely ignored the fact that he personally entered into a stipulation and he personally was to be bound by the stipulation and all proceedings thereunder and that all the judgment rendered herein did, was to hold him personally to this stipulation. The petitioner-defendant-appellant shows a complete disregard for the stipulation and a facetious attitude that the stipulation does not exist. When petitioner finally realizes he cannot completely disregard the stipulation, he then attempts to create an impression that the stipulation was used only to attempt to bind the church and not him, and that he is merely a spectator and bystander. Obviously the opposite is true. The stipulation was personally against him, was entered into with his consent, in his presence and with his attorneys' consent, knowledge and acquiescence in open court (see Judge Steinbrink's decision, *infra*) and he should at all times respect it and be bound by it.

All proceedings previously had herein clearly show that after the stipulation was entered into, all parties adhered thereto in that: (1) the appellant asked for forgiveness from his flock; (2) unable to obtain same; (3) charges being continued; (4) an election was held, supervised by the Honest Ballot Association pursuant to the stipulation. The

election clearly disclosed why appellant so readily entered into the stipulation of settlement. There is no doubt that he had a pre-devised scheme in his mind to stuff the ballot box and thereby felt he could never be defeated at an election.

However, pursuant to the terms of the stipulation the "ringers" were brought to a hearing before the learned Special Referee, Hon. Meier Steinbrink. The record clearly indicates that this was the very plan advocated by the appellant and his attorneys, because his attorneys took the stand and so testified.

From the testimony of Nathan Amcham (attorney for petitioners):

> "Q. • • • What was there to prevent them from importing them from other churches, and bringing them in to vote? A. Mr. Abrahams of the Honest Ballot Association, who conducted the election, stated, and we both agreed, that anybody who asked for a ballot. . . .
>
> Q. Would be given one? A. Yes, and when it is challeneged, *it would be put in a separate envelope, and left for your Honor to determine*" (1727). (Emphasis supplied)

This, of course, ended any objection whatever to the proceedings.

The cases cited in this brief clearly show that jurisdiction may be conferred upon the Court by stipulation and further that the parties are bound, not only by the stipulations, but by the theory upon which the action is tried.

On appeal to the State Courts the defendant raised three points only one of which is pertinent at this time, to wit: that the judgment entered was unconstitutional and void. This was the first time that the defendent-petitioner-appellant ever raised the issue of constitutionality. It was never raised in either the pleadings or in issue during the course of the trial. The first time this was raised was on appeal in the Appellate Division. In connection therewith, there was a specific finding by the Special Referee that under the proof adduced there was no ecclesiastical judicatory which could pass upon questions at issue in the instant case (1992) and that while the matters of hiring clergymen for a church is one that is ecclesiastical in nature, civil courts retained jurisdiction to determine a dispute as to a given election where question of control and management of temporalities will be settled by the determination of such disputed ecclesiastical matter and especially where the evidence adduced showed that the peitioner-defendant-appellant was an officer of a corporation and had authority to sign checks jointly with the secretary of the corporation (Plaintiff's Exhibit "3" printed opposite page 678).

Petitioner-defendant-appellant cannot now be heard to press the argument as to the separation of ecclesiastical and civil judicial courts in view of the fact that he agreed by the stipulation mentioned to abide by the vote of the members to stay in his position or go therefrom when the charges were made and voted upon, nor can present counsel be heard in derogation of Mr. Amcham who tried the case on behalf of the petitioner-defendant-appellant, in view of the fact that Mr. Amcham is an able, capable and well-seasoned trial attorney who knew exactly what he was doing at all times, as is very ably demonstrated in a review of the trial record.

POINT I

The Court should not entertain jurisdiction by reason of defects in the petition.

In the revised rules of the Supreme Court of the United States adopted April 12, 1954 and effective July 1, 1954 at page 22 on a petition for a writ of certiorrari the Rules require that the petitioner seeking to review a judgment of the said Court shall specify in his statement of the case the stage in the proceedings in the Court of the first instance and in the Appellate Court at which and the manner in which federal questions sought to be reviewed were raised, as well as the manner in which they were handled in the pertinent court.

This the petitioner has failed to do and a review of the pleadings and all of the proceedings will show that the issue of an alleged federal question was not timely and not properly raised.

The four affirmative defenses raised in the answer submitted to the original complaint were waived by the stipulation of settlement entered into before the learned Special Referee so that at no time was a federal question ever raised in the trial court.

The raising of the federal question as a point in the appellant's brief in the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department was held to be an insubstantial one by the Court of Appeals.

Thus, the Supreme Court of the United States cannot accept jurisdiction to review the judgment on this writ of

certiorari where the petitioner has failed to so specify the raising of a constitutional question in the Court of first instance and in accordance with the requirements of the Rules of this Court.

POINT II

The finding of fact that the 14 persons who attempted to vote at the church election were non-members ("Ringers") and were brought to the election in furtherance of a conspiracy to "stuff the ballot box"[1] is not an excommunication and does not create a constitutional question.

The law is clear that a party is bound by his stipulation even if he waives a constitutional right in it.

In *Matter of Mallory*, 278 N. Y. 429, the *per curiam* opinion contains the following at page 433:

> "The parties being of full age, could enter into a stipulation or bind themselves by acquiescence • • •. Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only bind them, but which the courts are bound to enforce. They may stipulate away statutory and even constitutional rights (Matter of N. Y. L. & W. R.R. Co., 98 N. Y. 447, 453). • • • "

In the case of *Morse, Jr.* v. *Morse Dry Dock & Repair Company*, 249 App. Div. 764, 291 N. Y. S. 995, the *per curiam* opinion of the court contained the following:

> "• • • The stipulation was in due form (Rules of Civil Practice, Rule 4). Courts look with favor

upon such a stipulation, which becomes the law of the case (*Cohn* v. *Cohn*, 120 Misc. 731; *Lee* v. *Ridd*, 120 Misc. 407 and cases therein cited). It is competent for parties to waive their statutory or even constitutional rights by stipulation and to agree upon the procedure they will follow (*Twin Realty Corp.* v. *Clens Falls Portland Cement Co.*, 225 App. Div. 515; *Matter of Cushman*, 177 App. Div. 127; *DiDonato* v. *Rosenberg*, 230 App. Div. 538). If the agreement be not unreasonable or against good morals or sound public policy, a party may thus stipulate away his rights, both statutory and constitutional, and make the law applicable to the action and such agreement will be enforced (citing cases) * * *."

In the case of *Pines* v. *Beck*, 300 N. Y. 181 the opinion of Bromley, *J.* contained the following on page 187:

"And in *Matter of New York L. & W. R.R. Co.* (*supra*) in holding that the parties had effectively restricted the power of the Supreme Court to appoint Commissioners for appraisal, the court said (98 N. Y., at pp. 452-453): 'the agreement of the parties bound them and concluded the court in that proceeding, and the court was bound as between the parties to observe, enforce and carry out the agreement. Parties by their stipulations may in many ways make the law for any legal proceedings to which they are parties, which not only binds them, but which the courts are bound to enforce.'"

Pursuant to the stipulation an election under the watchful eye of the Honest Ballot Association was held. Because it was found necessary to challenge numerous ballots pursuant to section 13 of the Stipulation (188) and the matter was referred back to the Special Referee only

to determine whether the challenges were proper or not. Without objection from either party this issue was tried before the Special Referee for some 7 days. In fact counsel for appellant while on the stand testified that this was the very procedure he had agreed upon in advance. See quoted portion of Mr. Amcham's testimony, *supra*.

This certainly was a concrete example of the attitude of appellant's counsel at the hearing and it certainly *forbids a contrary agreement in any appellate court.*

By acquiescence in the stipulation, it is without question that the petitioner-defendant-appellant submitted himself to the fortunes of war as they might eventuate in the action as it was brought by the plaintiffs-respondents as deacons, trustees and members of a religious corporation and with the religious corporation itself as a party plaintiff.

Moreover, the stipulation very plainly and specifically stated that while the petitioner-defendant-appellant was not conceding that the method and form used by the plaintiffs in the action was proper, nevertheless "the parties agree that the following modus operandi should be used to settle the dispute herein". It is thereby felt that the defendant waived whatever defect there existed, if any, in the plaintiffs' action and provided the procedure as set forth in the stipulation for the means of deciding whatever defenses existed between the parties with respect to the defendant's tenure as pastor and what everybody was conceding to be the church involved whether it be in a corporate form or in an unincorporated form.

In a complete review of t[illegible]ent submitted that the judgment appealed from was [illegible] for the reasons specified by him, we find defendant chasing his tail around in a

circle, raising the defense while at the same time arguing the merits of the stipulation.

In the case of *Quicker-Berner* v. *Macy*, 250 N. Y. 341 the opinion of Lehman, *J.* contained the following at page 347:

> "In this case the plaintiff is not in a position to raise such question. A judgment must rest upon proof in regard to all matters which are in dispute between the parties, but the parties may themselves determine what matters are the subject of disputes and upon which proof may be required. The court having jurisdiction of the persons and of the subject matter of the dispute passes on nothing else. Not only the express language of a stipulation or concession but the construction which the parties place upon it and their attitude at the trial must be given effect in determining the force of a stipulation or concession. Here the defendant's attorney repeatedly stated to the court that the plaintiff had conceded and had stipulated that there was a joint election, and the plaintiffs' attorney conclusively evidenced his acquiescence in those statements, not only by silence but by arguing only the legal effect of a joint election. To allow a judgment in plaintiff's favor to stand not because the plaintiff has in fact failed to join in the employer's election or even because there is a real dispute on this point, but because the defendant rested upon a stipulation which both parties regarded as sufficient to show a joint election, would be entirely subversive of justice. . . . ."

(a) The attempt to stuff the ballot box:

Reverend Wilson was well informed in advance of his conduct (76-82) that he had alienated his flock but he readily consented to submit the question to vote because he

probably had sinister schemes in mind that would assure him the election. First he destroyed the by-laws that were last seen in his possession (119). He tampered with the other church records and up until now has never produced the books and records of the church. The call went out to other ministers that they should come and vote because he was in trouble (1369-1370). (None of them were concerned over the fact that they were not members of Ebenezer so not entitled to vote). Former members who had long since moved far away (555, 556) or had joined other churches (1262-1271) were brought in to vote. Persons who according to the by-laws were no longer members also came forward for appellant and last we have many children who not only did not know what was involved and were not even members of the church at the stipulated date (189) were brought to the church to vote for Reverend Wilson. The colloquial expression for these persons are "ringers". Petitioner in this petition had the temerity to claim that Judge Steinbrink "excommunicated" these persons and "stripped them of their rights to vote". The opposite is exactly true. These persons were not members and did not have a right to vote consequently the decision of the court pursuant to stipulation and agreement (1727) is binding and unassailable.

The court well knows the high esteem and regard in which the learned Special Referee Hon. Meier Steinbrink has been held in all of his decisions he has handed down. Special notice should be taken of his decision in the *Melish* case, in which he specifically held that no ecclesiastical questions were to be passed upon.

No Judge or justice of the Supreme Court of the State of New York has ever sat and decided more church cases

than has the learned Special Referee, Hon. Meier Steinbrink. At no time has this court ever found that Judge Steinbrink, as a judge sitting in a civil court case, passed on ecclesiastical questions. Certainly Judge Steinbrink did not pass upon any ecclesiastical questions herein.

A parallel situation such as is claimed here existed in the *Melish* case, *Rector* v. *Melish*, 301 N. Y. 679, cert. denied 340 U. S. 926, where the Supreme Court of the United States refused certiorari and held that no ecclesiastical questions were passed upon. In the *Melish* case no stipulation existed as exists in the instant case. He merely applied the ecclesiastical law to the qualifications on members as provided for in the by-laws, rules and regulations of this little church, whose pastor he termed treated it as his "vest pocket possession."

(b) The by-laws of the Church:

The book that contained the by-laws was never produced, but, the indication that it existed came not only from plaintiffs' witnesses, but also from the witnesses whose testimony was vouched for by appellant, and the court was justified in finding for respondents (119) in that respect. Mr. Miles saw the book and actually read out of it (1821, 1922) and he heard appellant speak from the pulpit concerning the by-laws and state that they contained words to the effect that if a person fails to attend three communions for three months or fails to pay dues for six months he is automatically dismissed (1824, 1825). *Thomas Harrison* heard the same statements and saw the by-law book (1769-1772). *Della Burgest* also heard Reverend Wilson make the same statement (1595-1599). The appellant claimed that according to Hiscox one could never lose his membership in the

church but this was blasted by the actual fact that after being absent both *Thomas Harrison* (1761, 1764) and *Della Burgest* (1583-1588) were forced to seek reinstatement by explanation and vote of the church. *Claudette Smith* also heard these statements by Reverend Wilson (1063, 1065, 1097), *Julius B. Bostic, who was the son-in-law of Reverend Wilson* and a witness for him also was told that after he had been away for six months he could not be reinstated to his membership (922) until he was approved by the church. He was positive his father-in-law told him that this was required by church procedure and actually he was reinstated by such method (909-915). *Ed Brown* also saw the by-law book (1937).

We also note that another of appellant's witnesses *William H. Powell* claimed to have been reinstated the same way. In face of this preponderance of evidence the weak denial of Reverend Wilson that these witnesses were confused (1924), that he never made such statements (1928, 1929) and the church had no by-laws (1128-1130) was rightfully disbelieved by the Special Referee.

(c) The persons whose votes were successfully challenged by plaintiffs:

The learned Special Referee was absolutely correct in refusing to give any credence or honor the votes of the children and that there were in fact by-laws in this church. The arguments submitted in criticism of the Special Referee's findings are captious because the bill of particulars submitted in the trial court and the pleadings clearly indicated that whatever by-laws there were, they were always in the possession of the petitioner-defendant-appellant, who, to this very day, has failed and refused to turn same over. He

further overlooks the fact that several of the petitioner-defendant-appellant's own witnesses testified to the fact that there were by-laws and that the petitioner-defendant-appellant had stated that such by-laws were in existence.

The brief of the petitioner-defendant-appellant does not disclose that the record before the learned Special Referee indicated that in 1948 the church is alleged to have signed a contract to convey the parsonage at premises 1108 Herkimer Street, Brooklyn, New York, to the defendant in consideration of the sum of $2,000 in arrears of salaries it is alleged it could not pay him at that time. The contract is signed between the defendant as one of the trustees and as an officer of the corporation with himself as purchaser.

He further admits that in his dealings in 1948 to obtain possession of this church property or parsonage for himself, that this was not a wholly legal transaction inasmuch as the membership of the religious corporation had failed to approve the transaction and the Supreme Court of the State of New York had failed to give its consent to the transfer of the said property to the petitioner-defendant-appellant in accordance with the requirements of the Religious Corporation Law of the State of New York.

While it was a fact that plaintiff-respondents did challenge the votes and some of the challenged votes were children, the trial court found, as a matter of fact (and the question was affirmed by both the Appellate Division and the Court of Appeals of the State of New York) that the contested voters were not members of the Ebenezer Baptist Church. The language to the effect that they were children of tender age, etc. was not the basis of the learned Special Referee's findings of fact.

It is respectfully submitted that the Appellate Courts are bound by findings of fact which have been affirmed by the Appellate Courts of the State of New York and as such findings of fact are the law of the case.

There must have been times when Mr. Miles thought that he was at the wrong church because there were so many strangers present. Of course, he challenged such persons. This was according to the stipulation and agreement (1727) left the matter to the Special Referee to determine.

The learned Special Referee saw and heard these persons. In addition he heard the testimony of all other witnesses which included testimony as to what the by-laws were of the church and he examined all of the books that were offered in evidence and his decision as to each witness was factual and should not be disturbed on this appeal.

(d) Distinctions to be noted:

We also note that great stress is placed by appellant upon the case of *Walker Memorial Baptist Church* v. *Samuels* 285 N. Y. 462. This case is so far distant from the within matter that we do not need to enter into a long discussion on same. Suffice it to say that a stipulation governing the actions of the parties was not entered in this *Walker* case. However, we cannot allow certain quotations in the petition to pass unnoticed.

On page 3, petitioner barefacedly stated "because the petitioner is an officer of the church, the spiritual body and not an officer of the corporation." This rash statement in appellant's brief entirely ignores the following exhibits found in the record: Plaintiffs' Exhibit 3, at pages 678 and 679; plaintiffs' Exhibit 4 at pages 680 and 681. In both of

these exhibits we find resolutions that have been signed by Anderson W. Wilson, as President of the religious corporation, Ebenezer Baptist Church, Inc. These exhibits are self-explanatory and completely nullify appellant's argument to the contrary.

We need not remind this court that it should take jurisdiction only on constitutional questions of law while the only questions involved in this application are factual questions and that all of these factual questions were decided in respondents' favor and are supported by substantial evidence. Consequently, there are practically no problems that requires the court to take jurisdiction.

It must also be noted that the Appellate Division which court has the power to pass on questions of fact may have found different facts upon a theory different from that of the trial court with which to sustain the judgment. This was proper as an affirmance of the judgment below in the Appellate Division and may be on any sufficient ground found in the evidence. *Erie R. Co.* v. *International R. Co.* 209 App. Div. 380, 384, aff'd. 239 N. Y. 598.

This follows in line with the rules that a correct decision should not be reversed merely because a wrong reason has been assigned therefor. *Goodrich* v. *Ross, Ketchum Co.* 274 App. Div. 157, 160; *Korde Corp.* v. *Casino Classics, Inc.* 280 App. Div. 740, 742.

(e) The cases cited by appellant have no application to the within fact:

We need not spend much time in discussing the cases cited by appellant. The law expounded by them is not disputed. However, they are foreign to the facts of this case

in that they do not aid the court in any manner. This is not a situation where a rector was told that he had voluntarily entered the ministry and thereby became subject to the rules and canons of the church and he must pursue his remedies within the organization (*Rector* v. *Melish*, 301 N.Y. 936, certiorari denied, 340 U. S. 936). Nor does the case involve burial in a cemetery where the church prohibits same because of failure of the deceased to die in communion with the church (*McGuire* v. *St. Patrick's Cathedral*, 54 Hun 207). This certainly is not the case where the court's jurisdiction was invalid to "revise or question ordinary acts of church discipline" (*Waller* v. *Howell*, 20 Misc. 236). The remaining cases cited by appellant are all in the same vein and it is a waste of time to discuss them. Sufficient is it to point out to this court that it is admitted that the Ebenezer Baptist Church does not have a high judicatory (305, 324-326) and the right to vote in the church is controlled by its by-laws (307-309, 340-342, 371, 372, 385-388). The overwhelming evidence in the case compelled the Special Referee to find as a question of fact that the church had by-laws (119) and with the aid of these by-laws the questions left to the Special Referee (1727) were decided. No cases have been cited by appellant where pursuant to stipulation and agreement the court involved the vote of non-member outsiders who had wrongfully attempted to interfere with the church's right to have its members decide its future course.

It is clear from the above that no constitutional questions were raised at the trial term, so, therefore, they could not be raised in the Court of Appeals or in this court. *The Matter of City of Yonkers* v. *M. E. D. Corporation*, 262 N. Y. 548; *Nod-Away Company, Inc.* v. *Carroll*, 240 N. Y.

252; *Gleanswer Compressed Air Supply Company, Incorporated* v. *Thompson-Starrett Company*, 245 N. Y. 509.

In the instant case, we have even more than such technical grounds.

As pointed out above, the church in question was not part of a system that had an appellate judicature such as the Roman Catholic Church. Each church is a separate and independent unit whether Congregational, Baptist or Jewish. However, it has been the contention of the appellant in this court that only the church body and not the court could have passed on the qualification of voters. In other words, he has contended that the very "ringers" who corrupted the election should have determined their own qualifications to vote. This is certainly a ridiculous argument; but in view of the fact that at the hearing the qualification of the voters were determined pursuant to the stipulation and pursuant to the theory evolved by the appellant and his counsel, we do not need to even consider the far-fetched assertions.

We again inform this court, and it is obvious from both the majority in the Appellate Division, and unanimous affirmance in the Court of Appeals that the affirmance was upon the ground that each and every challenged voter whose challenge was sustained was not a member of the church and a pure outsider coming without membership or qualifications to support him and this included the challenged children. It is clear in the record that their right to vote did not only depend upon their age, because each and evry child whose vote was disregarded was proven to be *not* a member of the church under any circumstances.

So once more, it is clear that constitutional grounds are not open as the affirmance was on other grounds. *Matter of Haydron* v. *Carroll*, 225 N. Y. 84 at page 88.

(f) Defendant having proceeded to enforce the terms of the judgment cannot contend same is void and appeal therefrom:

On the hearing the attorney for plaintiff notified the Special Referee that moneys have been collected for the Church but he did not know what to do with it because he was unable to contact the other attorney prior to the trial (1862, 1863).

The Appendix A attached to appellant's brief shows that he recognized both the stipulation and judgment herein so he no longer is in a position to contend that both are void.

Murphy v. *Spaulding*, 46 N. Y. 556;
Knapp v. *Brown*, 45 N. Y. 207;
Bennett v. *Van Sickle*, 18 N. Y. 481;
Metropolitan Trust Co. v. *Longacre Electric Light & Power Co.*, 223 N. Y. 69.

Attached to this brief is Appendix A which further supports this point.

In support of this point we submit subpoena, summons and complaint served after the judgment which was entered which is a ratification of stipulation of settlement and the judgment. Exhibits C, D and E— It is proper to submit uncontroverted evidence to affirm a judgment.

O'Connor-Sullivan, Inc. v. *Otto*, 283 App. Div. 269, 127 N. Y. S. 2d 373;
Latourelle v. *New York Central Railroad Company*, 275 App. Div. 123, 89 N. Y. S. 2d 296.

Summary of Argument

Petition must fail because:

(a) it fails to specify the raising of the alleged constitutional question in the court of first instance;

(b) it raises questions of fact which have been disposed of by the Trial Court and affirmed by the Court of Appeals of the State of New York, said questions of fact not being subject to the review of the Supreme Court of the United States;

(c) the Court of Appeals of the State of New York has determined that the alleged constitutional questions are not constitutional questions and, if anything, they are of an insubstantial nature;

(d) any alleged constitutional questions were waived by the petitioner in entering into a stipulation of settlement in the court of first instance;

(e) any alleged constitutional questions were further waived by the petitioner in that petitioner in other plenary actions and proceedings sought to enforce both the stipulation and the judgment based upon it. Petitioner cannot contend that the stipulation and judgment are void and at the same time proceed to enforce both the stipulation and judgment.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

SOLOMON Z. FERZIGER
Attorney for Plaintiffs-Respondents
16 Court Street
Brooklyn, New York

On the brief:

SOLOMON S. FERZIGER
HERBERT H. PENSIG
BERNARD MEYERSON

APPENDIX "A"

Decision and Findings of Hon. Meier Steinbrink, Official Referee

NEW YORK SUPREME COURT,

KINGS COUNTY.

Special Term, Part III.

[SAME TITLE.]

Brooklyn, N. Y., December 19, 1957

Before

Hon. Meier Steinbrink,
Special Referee.

Appearances:

Solomon Z. Ferziger, Esq., (16 Court St., Brooklyn, N. Y.) Attorney for the Plaintiffs.

Pokorny, Schrenzel & Pokorny, Esqs., (66 Court St., Brooklyn, N. Y.) Attorneys for the Defendant, By Nathan Amchan, Esq., of Counsel.

The Referee: The following will be the findings in this case in keeping with Section 440 of the Civil Practice Act. In addition to what I shall say, either side may submit to me additionally requests for findings of fact or conclusions of law, but I say to both sides that any such requests to find, if they are inconsistent with what I now purpose to dictate to the record will be refused.

This is an action which was began in September, along about the 13th of September, 1957, in which the plaintiffs

are Arbie R. Miles and Ed Brown, individually and as deacons, trustees and members of the Ebenezer Baptist Church, and Ebenezer Baptist Church, Inc., against Anacin W. Wilson, individually and as pastor of—it says Ebenezer Baptist Church, Inc. I pause here to observe that there can be no pastor of a corporation. That is evidently a typographical or stenographic error. But in this complaint they ask for an injunction restraining Wilson and any of his representatives from acting as pastor of the Ebenezer Baptist Church and from entering upon the property of the plaintiffs or in any way attempting to conduct religious services; also enjoining him from assuming or exercising any dominion or control over the church or any of its property, funds, etc.; furthermore, for injunction directing him to remove from and deliver us possession of the church and turn over to the plaintiffs, as such deacons, all the records, documents, etc., which he may have, or from interfering with the control of the worship and spiritual jurisdiction of the church, and declaring the rights and other legal relations of the parties.

After this action was begun the parties had one or two rather long conferences with me, as the result of which they entered into a stipulation in court on October 21, 1957, which was termed a stipulation of settlement. Some of the provisions of this stipulation are either no longer applicable nor germane to the decision of this case. There, however, survive that stipulation the provision that the charges against the defendant Wilson were to be heard by the Board of Deacons and that if they voted to entertain, then a notice to that effect should be given to the pastor, giving him an

opportunity to appear with his witnesses, if any, at a time and place that was stipulated. There were such charges, there was such a meeting held on October 30, 1957, of which we have the minutes.

I pause here to say that many of these good colored people are not of the highest intelligence, nor of education, and it is for that reason that in many respects some of these writings are not written as grammatically or in as perfect English as one would expect from a lawyer or layman who had a good education.

The Board of Deacons considered the charges and by more than a majority of the vote, according to the minutes, they entertained the charges, after motion was made, seconded and accepted, and the vote at that time was by a majority. It is stated that the minutes were accepted and adopted.

Going back to the stipulation of settlement, it was provided that there was to be a vote of the congregation on the question of the pastor vacating the parsonage. The question of the pastor vacating the adjoining premises, 1106 Herkimer Street, was raised, but will not be disposed of at this time because a pastor contends that he is the individual owner thereof and that it isn't church property.

I say now, without embodying it in the judgment, that he is not the owner of the premises. Ownership of those premises is governed by Article 7 of the Religious Corporations' Law. He doesn't pretend to have any deed. He has what is termed a contract where on behalf of Ebenezer Baptist Church, Inc., it was set forth what the consideration was and that he was to later get a deed, but one thing that

should be emphasized is that he, signing himself as a trustee, was signing this agreement to have conveyed to himself this property. That is absolutely contrary to law, for a trustee owes to the principal the duty of highest care and honesty, as was set forth in *Meinhardt* against *Solomon*.

The stipulation further provided that the Court was to retain jurisdiction and if it became necessary to interpret or enforce the stipulation, then either party might apply upon three days' notice for such relief as they might believe themselves entitled to.

Now comes the important part of this stipulation of settlement and the part that must be decided here. It is paragraph 14. "In the event a special stated meeting of the church society or congregation as a sequence of the steps herein above set forth is required, the representatives of the Honest Ballot Association shall be called in to supervise the vote taken at such meeting and the expense thereof shall be borne equally between the parties hereto. The certification of the Honest Ballot Association as to the vote shall be binding upon the parties hereto."

I turn now to the certification by the Honest Ballot Association. It is in evidence here as Defendant's Exhibit H. It sets forth that there were 75 unchallenged ballots and 25 challenged ballots. Both sides seem to be in accord that the vote was taken, so far as unchallenged ballots are concerned, that those votes were not in and of themselves binding on both parties, because if they were, then under the unchallenged vote against life tenure there were 43, while the total of unchallenged votes for life tenure was 31. The same vote identically was recorded with regard to whether

they desired that the services of Wilson be terminated. 45 voted to dismiss, 31 voted to retain. In addition, there was one challenged vote against life tenure—that was the vote of John Townes— and on this trial that challenge was withdrawn, for which reason that vote must be added to the 43. That makes 44. There were 24 challenged votes for life tenure, and there were also 24 challenged votes on the vote to retain. This was signed and sworn to by George J. Abrams, the executive secretary, the committee on labor elections, of the Honest Ballot Association.

The Honest Ballot Association, in the performance of their duty, returned as Schedule B the challenged ballots, made up of 25 names. The first one we may disregard, because that is John Townes, and that has already been disposed of. Of the remaining 24 I now hold that the ballots of Barbara Stewart, of John N. Lewton, of Henry Wyne, of Nathaniel Lawton, of O. B. Barden, of Normadean Mitchell, of Shirley Stewart, of James Tate, of Jennie Noel, of Edith Brown, of Phyllis Blake, of Connie Mae Barden, of Linda Stewart, and of William Powell, I hold that the challenge is sustained, and that those were not valid votes.

I base this decision on a number of grounds. Among others, two of them, O. C. Barden and Connie Mae Barden had left the Ebenezer Baptist Church and had joined the Disciples of Christ.

Among the others there were immature childrens. It won't do to say that a child four or five or six years of age, who can just lisp the English language and who has no understanding of what he or she is doing, that those people, influenced by a parent or a grandparent, could pass

upon questions of this kind. Some of these children, when they were called here to the stand, were shown the official ballot used by the Honest Ballot Association and annexed to Schedule A, and they knew nothing about what the word "tenure" meant nor the word "dismissed" or the word "retained." How anyone could possibly say that votes of people of that kind should be counted passes my understanding. On might just as well say that if someone had been a member of the Ebenezer Baptist Church and thereafter was in a state mental institution, that they could bring him in to vote at this so-called election.

It shocks one's conscience to think that on questions which were as serious to these folks as the questions that were here presented, and undoubtedly presented at the Board of Trustees' meeting on October 20, 1957, when Wilson asked for forgiveness for any wrong he had done, how little children like that, among them this little Shirley Stewart, who at the time of testifying was only nine years of age, and when questioned she just didn't know what it was about, and the same was true of these other infants.

With respect to a number of others, and I include even some of the reverends who have testified here, it amountd to nothing more or less than what we speak of in politics as an attempt to stuff the bollot box. I disregard some of them absolutely and entirely. The unfortunate part of this case is that the defendant Wilson treated this church, and its properties, as being his vest-pocket possession, and it wasn't anything of the kind. These folks had the right in the religious society to decide these matters themselves, and when I say that I am not dealing with any ecclesiasti-

cal question, for the very simple reason that the Civil Courts never interfere with ecclesiastical questions where there is ecclesiastical control or an ecclesiastical judicatory. That was held many years ago by the United States Supreme Court in the case of *Watson* against *Jones*, and I myself passed upon this in the now more or less famous case of John Howard Melish of the Trinity Protestant Episcopal Church over here at Montague and Clinton Streets. I made it entirely clear in that opinion that where there is ecclesiastical judicature which passes upon a question, that the Civil Courts would not interfere. That opinion and decision appears in the Miscellaneous Reports. It was affirmed by our Appellate Division without opinion; it was affirmed by the Court of Appeals without opinion, and the United States on application denied a writ of certiorari.

Now I come to another feature of this case. From my list of votes it appears that by every stretch of the imagination in favor of the defendant there were only seven votes cast which were good. If these are added to the 31 which were unchallenged, it would give a maximum of 38, and out of the 100 ballots cast there would be a predominance and much more than a majority to rescind Wilson's life tenure and to desire that his services be terminated

I think it is most unfortunate that counsel for Mr. Wilson sought to inject into this case his own testimony in order to bolster his client's case, and that was done in this way: Nothing had happened up to that time which called upon him as a matter of duty to take the stand. However, he testified to certain conversations which he claimed to

have had with the plaintiffs' attorney and the associate of the plaintiff. And this he stated himself on the theory—it seems to me fanciful theory—of an estoppel. Estoppel may be invoked, not on the basis of conversations between the attorneys, for repeatedly it has been held, and is even provided in our rules, that oral stipulations between lawyers are not recognized. It was the simplest thing in the world if there were any such conversations, part of which I gravely doubt, to have made a list of the members and then for the attorneys both to have affixed their names, their signatures, to the list, because then it might well be held that it was a stipulation made in the litigation.

I don't know that it is necessary to go much further in this case. The whole set of ordination is a very simple one, it is not marked by college education or college graduation or anything of that kind. Take the case of Harrison, who is an assistant pastor. His testimony was clear, and I accept most or all of what he said. He told what his education was. I believe I inquired. Then through some Mumbo Jumbo Wilson ordained him and in that way made him a pastor.

Now as to this book of Hiscox, Defendant's Exhibit G, which is in evidence, some of them, even Wilson's brethren, who are reverends, when confronted by it said that they were not guided by it and didn't agree with it.

With reference to the body of some of the things stated by Hiscox, it may well be that what he stated were his opinions which should govern these Baptist churches, each one of which is autonomous. They are on congregational lines, the same as the Congregational Church and the same as

synagogues of the Jewish faith. There is nothing above them to control or guide them, excepting the Almighty God.

The thing that the defendant seems to rely upon with respect to some of these matters is not at all contained in the body of the provision with regard to church membership, but rather is a footnote which Hiscox himself makes to what he has written, namely, Note No. 14, on page 79, where he says that they all have equal rights and immunities, without distinction of sex, age or condition. That may very well be with regard to worship, but I absolutely decline to hold that that applies to elections or voting such as we have had in this case, for the very simple reason, as I have already pointed out, that some of these children were of a very low order of intelligence and didn't even know the meaning of the words on the ballots on which they pretended to noted.

There is also a provision here which provides that where one goes to or joins another church he is automatically out. Some of these people who had voted, as I have already pointed out, two of them at least, joined the Disciples of Christ. One might as well say that you can go into the Methodist Church or the Lutheran Church or some other church and still retain membership in Ebenezer. That will shock the conscience. Religion isn't quite as loose as that.

I am going to try to terminate this. I am regretful that this matter ever came before me. This has been the seventh day of the trial. Had counsel on both sides adhered to the one question of whether or not these challenged ballots were good or invalid I believe this whole case could have

been tried in two days or less, but they wandered far afield here and brought in questions of theology and everything else.

Nothing that I say here is in contravention of other decisions with respect to the provisions of Article 7 of the Religious Corporations Law, because that refers only to property rights, temporal matters. But even there you have at least a hint from the Legislature of what they thought regarding the property matters, for it is provided that only those shall be entitled to vote who have attained their majority.

Wherever there is any dispute in the facts with regard to any of the witnesses called by the defendant and those called by the plaintiffs, the findings of fact will be for the plaintiffs.

I say this regretfully again, because some of Mr. Amehan's testimony was contradicted flatly by Mr. Herbert H. Pensig, who is a member of the Bar. Pensig has no interest in the actual outcome of this case, but I am afraid Mr. Amehan was carried away by his enthusiasm for his client's cause.

Whatever judgment is submitted here, let it be in accordance with what I have dictated. I am still willing to pass upon any requests to find facts or conclusions of law. There will be no costs allowed to either party.

One further observation before I finish: I want to stress that all of the books and records in this case were kept in the possession of the defendant Wilson, and I find as a fact that this little church did have by-laws under which they acted and that they have not been produced on this trial.

Appendix "A"—Decision and Findings of Hon. Meier Steinbrink, Official Referee

Any proposed findings of fact and conclusions of law, in addition to what I have said, which are to be submitted here, are to be on two days' notice to the other side and all of it must be submitted not later than December 30th.

Mr. Ferziger: Judge Steinbrink, may I make one further request for a ruling for the purposes of peace at this moment. Your Honor has made a finding of fact, conclusions—

The Referee: Wilson is out from this time on. When the judgment is submitted to me, I will stay, voluntarily, though it hasn't been asked of me, my own judgment for thirty days in which the defendant may perfect an appeal if he is so advised. Within the thirty-day period the provisions of the stipulation are still to be observed, namely, alternating at the service.

I, Harry L. White, Official Court Reporter, do hereby certify that the foregoing is a true and correct transcript of the oral decision announced by Mr. Justice Steinbrink, Special Referee, at the conclusion of the trial of the above-entitled case.

Witness my hand this 23rd day of December, 1957.

Harry L. White
Official Stenographer.

Attest:

Clerk.

APPENDIX "B"

Stipulation

SUPREME COURT, STATE OF NEW YORK,

COUNTY OF KINGS.

ARBIE R. MILES, *et al.*,

Plaintiffs,

vs.

ANDERSON W. WILSON,

Defendant.

Brooklyn, N. Y., October 21, 1957.

Before:

Hon. Meier Steinbrink, Special Referee.

Appearances:

Solomon Ferziger, Esq., for the Plaintiffs.

Porkorny, Schrensel & Porkorny, Esqs., for the Defendant, by Nathan Amchan, Esq.

It Is Stipulated and Agreed by and between the attorneys for the respective parties and with the consent and knowledge of the respective parties who are present in Court and who have heard read this stipulation, that the above-captioned matter be and the same hereby is settled upon the following terms and conditions:

Without conceding that the method and form used by the plaintiffs herein heretofore is improper and without recog-

nizing the contention of the defendant that their form was improper and should have been used in another form, the parties agree that the following modus operandi shall be used to settle the dispute herein:

(1) On or before Tuesday evening, October 22, 1957, any member of the Ebenezer Baptist Church who shall so desire may serve upon Andrew W. Wilson, the pastor of the church, a statement in writing setting forth his charges and complaints against the said pastor of the church, or any other reason why he or they believe that the pastor's relationship or employment by the church should be terminated.

(2) On two evenings following the service of the within charges, including the evening that the charges have been served, the congregant or congregants preferring the charges against the pastor shall make themselves available at the church building so that the pastor may discuss the matter with them and discuss in person with them the charges made by them against him, including the request for the termination of his employment. Said discussions shall take place at the church between the hours of 8 p.m. and 10 p.m. in the evening.

The congregant or congregants desiring to make charges against the pastor shall be able to serve the pastor at either the study or the church between the hours of five and seven p.m. on Tuesday evening, October 22, 1957, and the pastor agrees to be available for the service of such charges.

In the event he is unavailable, Nathan Amchan agrees to serve as agent to receive such charges during the hours herein specified in the event that Reverend Wilson is unavailable during those hours to receive such service, and it

is agreed that service upon Nathan Amchan as counsel to the defendant shall be deemed service upon the defendant himself.

(3) In the event that the member or members after their discussion with the pastor still are unsatisfied and desire to press the matter further, then, in the event the pastor shall on or before October 25, 1957, at 8 p.m., which shall not be less than 40 hours after the last session, serve upon plaintiffs Brown and Miles a copy of his answer to the charges preferred.

Said answer shall be delivered to them personally at the church at 110 Herkimer Street, Brooklyn, New York, no later than 8:30 on the evening of October 25, 1957, and the said individual shall attend at the church for the purpose of receiving such answer, if necessary.

(4) In the event that the pastor has been able to discuss the matter with the congregants preferring the charges and the congregants do not desire to proceed with the matter any further, then this matter shall be deemed as settled and no further proceedings need be taken by either side as against the other.

(5) In the event, however, that the written answer is received as set forth hereinbefore and is not satisfactory to the members making the charge, then they may submit this matter further to the Board of Deacons for further action and consideration by the Board of Deacons.

(6) For the purposes of this stipulation, a special meeting of the Board of Deacons may be called by Arbie R.

Miles for Monday, October 28, at 8 p.m. at the church for the purposes only of this present matter. All parties stipulate and agree and concede that such short notice is sufficient and will not be questioned.

It is agreed that the notice when sent by Arbie R. Miles on today's date to all members of the Board of Deacons calling for the meeting presupposes that the charges which may be preferred shall be the only matter of business before the Board of Deacons at the stated meeting of October 28, with the distinct understanding by all parties hereto that the calling of the meeting for Monday, October 28, 1957, is in no wise to be construed as a premeditated or aforethough action to prejudice one side against the other, but merely a precautionary method to have a duly constituted meeting of the Board of Deacons to receive the matter should the aggrieved members still deem it necessary to submit it to the Board of Deacons, and for the purpose of having an orderly schedule and timetable of the proceedings.

(7) At the said meeting of the Board of Deacons the charges will be considered, and if the Board of Deacons by majority vote entertain the grievance, then a notice to that effect shall be forthwith given to the pastor either personally or by telegram, giving him an opportunity to appear before the Board of Deacons, with his witnesses, if any, at a scheduled meeting of the Board of Deacons held not less than 40 hours thereafter after the sending of the notice, and it is stipulated that such short notice will not be questioned by any party.

(8) The Board of Deacons shall consider the grievance and the pastor's proof, including that of any witnesses he may offer, and in the event that the Board of Deacons are satisfied by majority vote to dismiss the charges, that shall terminate the controversy and no further steps shall be taken by any party.

(9) In the event, however, that the Board of Deacons is not satisfied and shall by majority vote resolve to present the grievance to the church membership, the Secretary of the Board of Deacons shall prepare a written request to the pastor to call a church meeting, which written request shall specifically contain the purpose of the said requested special church meeting.

In the event that such written request is made by the Board of Deacons calling for a special church meeting, the pastor shall, without any discretion thereon, read the said written request at two successive Sunday church services next preceding the scheduled date of the said requested special church meeting.

In the event that the pastor fails to read such request, any member of the Board of Deacons or any member of the church may read said notice and it shall have the same validity as though read by the pastor at two successive Sunday church services.

(10) In the event that the meeting of the Church Society is called, that is, the meeting of the entire church body, and by majority vote the charges are not sustained, then in that event the matter shall be terminated and no further action shall be taken by any party and the pastor shall remain as heretofore.

(11) In the event, however, that the membership sustains the charges and votes to terminate the relationship as pastor to the church, then and in that event the pastor stipulates and agrees that he will forthwith terminate the pastorate, or at such other time, if any, fixed in the resolution.

(12) The question of the pastor vacating the adjoining premises, 1108 Herkimer Street, was raised but will not be disposed of at this time because the pastor contends that he is the individual owner thereof and that it isn't church property. That question, however, remains open without prejudice to either party.

(13) It is further stipulated and agreed that the Court retains jurisdiction of this action and that in the event that it is necessary to interpret or enforce this stipulation or take any further action with reference to the case, then either party may apply to the Court upon three days notice to the other for such relief as to the Court may appear just and proper.

(14) In the event a special stated meeting of the Church Society or congregation as a sequence of the steps hereinabove set forth is required, the representatives of the Honest Ballot Association shall be called in to supervise the vote taken at such meeting and the expense thereof shall be borne equally between the parties hereto. The certification by the Honest Ballot Association as to the vote shall be binding upon the parties hereto.

(15) The only persons entitled to vote at a meeting of the Board of Deacons or at a stated meeting of the Church

Society or congregation shall be those members who were such on September 10, 1957.

(16) Without conceding the allegation of the defendant herein that the defendant had heretofore received a life call from the congregation, before a vote may be taken upon the question of the termination or retention of the pastor as set forth hereinbefore, it shall be necessary that the resolution which the defendant alleges and claims was heretofore passed giving him life tenure shall be rescinded by a majority vote of the congregation.

(17) From the date hereof until all of the steps which may be taken as set forth in this stipulation, the defendant pastor shall not take the pulpit and shall not preside at any church services, it being expressly understood, however, that this shall not prevent him from officiating at a religious wedding, funeral or visiting the sick. All activities which were conducted prior to September 10, 1957 shall continue as heretofore without interference by the pastor or the aggrieved members, said activities being conducted by the same individuals who conducted these activities prior to September 10, 1957.

(18) It is further agreed that the pulpit will be occupied from this time forth and for as many Sundays as may be necessary until this controversy is resolved in accordance with this stipulation as follows: For the first Sunday the present pastor shall have the privilege of inviting a visiting minister to conduct morning services, and the Chairman of the Board of Deacons shall have the privilege of inviting a visiting minister to officiate at the afternoon services.

Each succeeding Sunday thereafter there shall be rotation, in that on the second Sunday of this period, by way of illustration, Deacon Miles shall have the privilege of inviting a minister to preside at the morning services and Reverend Wilson shall invite one for the afternoon service.

(19) It is further understood that both parties hereto will refrain from taking any action which might bring discredit on the church or create additional controversy, it being understood that all parties enter into this stipulation in good faith without mental reservation, and that the visiting ministers shall maintain an attitude of neutrality and shall make announcement to the effect that they are invited to speak there by voluntary consent of the parties to this unfortunate dispute.

The Special Referee: The plaintiffs Arbie R. Miles and Ed Brown and the defendant Anderson W. Wilson are present and have heard this stipulation.

Pending the carrying out of all of the terms of this stipulation, the defendant, Rev. Anderson W. Wilson, is restrained from selling, mortgaging or otherwise encumbering or disposing of the property referred to as the parsonage.

Mr. Amchan: I wish to ask you to change the word "restrained" to "agrees to," because this is a voluntary thing.

The Special Referee: All right, "agrees to," and by agreeing to it he is restrained from doing it.

I think the check account should be subject to countersignature by the two lawyers. They are both honorable men and I can trust them both.

Mr. Amchan: That is satisfacory.

Mr. Ferziger: Yes, satisfactory.

Mr. Amchan: I think the reporter omitted the sentence we agreed upon that notice to the members of the Board of Deacons for the proposed meeting on Monday, October 28, should be sent to them I think it was today.

Mr. Ferziger: It wasn't agreed. We said we could. We will send the telegrams today, Judge.

The Referee: The plaintiffs, Arbie R. Miles and Ed Brown, and the defendant, Anderson W. Wilson, are present and have heard the stipulation read. Pending the carrying out of all of the terms of this stipulation the defendant, Rev. Anderson W. Wilson, is restrained from selling, mortgaging or otherwise encumbering or disposing of the property referred to as the parsonage.

Mr. Amchan: I would like to have you change the word "restrained" to "agrees to" because this is a voluntary thing and—

The Referee: All right, "agrees to," and by agreeing to it he is restrained from doing it.

I think the check account should be subject to countersignature by the two lawyers. They are both honorable men and I can trust them both.

Mr. Amchan: That is satisfactory.

Mr. Ferziger: Yes, satisfactory.

APPENDIX "C"

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

ABBIE R. MILES and ED BROWN, individually and as Deacons, Trustees and members of the EBENEZER BAPTIST CHURCH INC., EBENEZER BAPTIST CHURCH INC.,

Plaintiffs,

—against—

ANAGIN W. WILSON, individually and as Pastor of EBENEZER BAPTIST CHURCH INC.,

Defendant.

SIR:

PLEASE TAKE NOTICE that pursuant to paragraph 13, paragraph 18, paragraph 19 including the material on page 12 and 13 of the stipulation of settlement dated October 21, 1957 before the Honorable Meier Steinbrink, Special Referee, and pursuant to the judgment of the Honorable Meier Steinbrink dated December 30, 1957, the defendant will apply to the Honorable Meier Steinbrink at his chambers at 9:00 A.M., on Tuesday, February 18, 1958 in the Municipal Building, Fulton and Joralemon Streets, Brooklyn, New York for an interpretation and an enforcement of his stipulation of settlement and the judgment entered herein on December 30, 1957, with respect to certain portions thereof.

Dated: New York, February 15, 1958.

Appendix "C"

Yours, etc.,

SNITOW & SNITOW
Attorneys for Defendant
Office & P. O. Address
152 West 42nd Street
New York, N. Y.

To:

FERZIGER & PENZIG, Esqs.
Attorneys for Plaintiffs
Office & P. O. Address
16 Court Street
Brooklyn, New York

APPENDIX "D"

Order to Show Cause

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

Our File No. 1025

EBENEZER BAPTIST CHURCH, INC.,

Plaintiff,

—against—

ED BROWN and ARBIE R. MILES,

Defendants.

ORDER TO SHOW CAUSE

Upon the annexed affidavit of India Wilson, duly verified February 15, 1958, the summons and verified complaint herein, let the defendants, or their attorneys show cause at Special Term Part I of this Court, to be held in and for the County of Kings at the Municipal Building Room 1100H Court at Fulton and Joralemon Streets, Brooklyn, New York, on the 7th day of March, 1958 at 10 a.m. or as soon thereafter as counsel can be heard, why an order should not be made herein enjoining and restraining pendente lite, the defendants, their agents, or representatives, during the pendency of this action from:

(1) Disturbing Sunday religious services.

(2) Changing the locks on the church doors.

(3) Misappropriating the monies of the church corporation.

(4) Misappropriating the monies of the Sunday School.

(5) Violating the stipulation of settlement made before the Hon. Meier Steinbrink in Miles v. Wilson on October 21, 1957.

(6) Violating the judgment made by the Honorable Meier Steinbrink, Special Referee dated December 30th, 1957. (Underscoring ours)

(7) Illegally calling meetings, without the knowledge, permission or consent of the plaintiff.

(8) Making By-Laws, without the knowledge, permission or consent of the plaintiff.

(9) Electing Trustees and Deacons in violation of law, against the wishes, knowledge, permission of consent of the plaintiff, and in violation of the stipulation of settlement of October 21, 1957.

(10) Continuing to invite ministers to preach in the church in violation of the judgment dated December 30th, 1957, the stipulation of settlement dated October 21, 1957 and against the wishes knowledge, permission or consent of the plaintiff and its official bodies.

(11) Causing crowds to collect in front of the church and causing the church to be disgraced and humiliated amongst its friends and neighbors by loud and boisterous conduct, in order to take over the control of the plaintiff, and against its wishes and against the wishes of its membership and its official bodies.

(12) Restraining the defendants from interrupting and breaking up religious services and religious meetings, while being conducted by the plantiff and its duly constituted official bodies.

(13) Restraining the defendants from refusing to deposit the monies of the church corporation, in the church corporation bank account, the checks to be countersigned by the attorneys, pursuant to the stipulation of October 21, 1957, so that the church can pay its bills, which due to the defendants' misappropriation of the funds, as aforesaid, the plaintiff is unable to pay the same.

(14) Restraining the defendants from threatening to continue to defy the plaintiff, its Board of Trustees, its Board of Trustees, its Membership, the Laws of the State of New York, and the canons, customs and usages of the church by doing the acts and things and threatening to do the acts and things hereinabove and hereinafter set forth.

(15) From interfering with and from removing any and all of the records, documents and papers of the plaintiff and from threatening to do so, and for such other, further and different relief as to this Court may seem just and proper in the premises.

And it appearing from the affidavit, and the summons and the complaint that the defendants threatened to and are about to continue to do the aforesaid acts and things, all of which will be detrimental to the interest of the members of said plaintiff, and its church, and that irreparable injury, loss and damage will result to the plaintiff, and its church.

Appendix "D"—Order to Show Cause

The defendants having been personally put on notice that this order was being presented for signature today, based on the aforesaid arguments held on February 14, 1958, I do hereby order and direct that service of a copy of this order, and the papers upon which the same has been granted upon the defendants or any of them, on or before 5th of March, 1958, shall be deemed sufficient notice of motion herein, and of the application for this injunction pendente lite.

/s/ Edw. G. Baker
Justice of the Supreme Court

Dated at
Brooklyn, N. Y.
Feb. 19, 1958

APPENDIX "E"

Summons With Notice

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF KINGS

EBENEZER BAPTIST CHURCH, INC.,

Plaintiff,

—against—

ED BROWN and ARBIE R. MILES,

Defendants.

Plaintiff designates Kings County as the place of trial.
Plaintiff resides in Kings County.

SUMMONS WITH NOTICE

To the above named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, New York, February 15, 1958

SNITOW & SNITOW
Attorneys for Plaintiff
Office and Post Office Address
152 West 42nd Street
New York, N. Y.

Appendix "E"—Verified Complaint

Verified Complaint

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF KINGS

EBENEZER BAPTIST CHURCH, INC.,

Plaintiff,

—against—

ED BROWN and ARBIE R. MILES,

Defendants.

VERIFIED COMPLAINT

The plaintiff complaining of the defendants, by its attorneys, Snitow & Snitow, respectfully states to this Court and alleges:

First: That the plaintiff is a religious corporation duly organized and existing under the laws of the State of New York and having its principal place of worship in the County of Kings, City and State of New York.

Second: That the plaintiff maintains as part of the work of its parish a church at 1110 Herkimer Street, County of Kings, City and State of New York, known as the Ebenezer Baptist Church and owns the aforesaid church building and the land upon which it is built.

Third: That the plaintiff is an independent Baptist Church corporation not governed by any central governing

body, owing an allegiance to its membership, and the State of New York.

Fourth: That at all times hereinafter mentioned, the defendants Ed Brown and Arbie R. Miles were officers and members of the plaintiff.

Sixth: Upon information and belief the defendants are residents of the County of Kings, City and State of New York.

Seventh: That on or about the 1st day of September, 1957, the defendants entered into a conspiracy, either jointly, or severally, either expressly or by implication of law which had for its purpose, the destruction of the plaintiff, the character assassination of its pastor, Reverend Anderson W. Wilson, the misappropriation of the funds of the church corporation, the disturbance of religious services, the changing of the locks on the doors of the church, the misappropriation of the monies of the Sunday School, the use of the name of the church corporation, illegally and in violation of law in the Supreme Court, Kings County in an action entitled Arbie Miles, et al., v. Anderson W. Wilson and so forth, defendant, to illegally cause the discharge of the minister, to illegally attempt to exercise jurisdiction and control over the holding of services, the exercise of ministerial function of the church, control over the worship and spiritual jurisdiction of the church, control over the church and the parish, defiance of the laws of the plaintiff and the State of New York, defiance of the Canons, Customs and Useages of the church, decency and

good order, threaten to and have in fact by display of unseemly conduct, in defiance of the plaintiff, exercised official duties and office and carried on meetings and religious services in a manner calculated to desecrate the sanctity of the church building, hold the plaintiff up to obloquy, scorn and ridicule, and seriously interfere with the sacred work in which the plaintiff is engaged.

Eigrth: That the defendants, pursuant to the aforesaid conspiracy, did individually, and/or jointly and/or severally the following: On the 17th day of September, 1957 the defendants presented to the Honorable James S. Brown, Justice of the Supreme Court an order to show cause, summons and complaint, in which they sued and named the plaintiffs as follows:

> "ARBIE R. MILES and ED BROWN individually and as Deacons, Trustees and members of EBENEZER BAPTIST CHURCH INC., and EBENEZER BAPTIST CHURCH, plaintiffs"

The aforesaid papers were presented for signature to Mr. Justice Brown, upon information and belief by the defendants attorneys Solomon Z. Ferziger and Herbert Penzig. That the naming of the Ebenezer Baptist Church Inc., as a plaintiff was illegal, unauthorized and void, in that it was done without permission, knowledge or consent of the board of trustees, and without authorization from the board of trustees pursuant to law.

Ninth: That upon the commencement of the aforesaid action above referred to on or about September 17, 1957

the defendants submitted an order to show cause to Mr. Justice Brown which read in part:

> "Why an order should not be made herein restraining defendant his agents or representatives during the pendency of this action from acting or attempting to act as pastor of the plaintiff church and from entering upon the church property and from interfering with the property, funds and management of the plaintiff church, and from removing any and all of the records, documents and/or indicia of his office as pastor thereof, and for such other and further relief as to this Court may seem just and proper.
>
> • • • ".

That at the time this order to show cause, summons and complaint and affidavit in support of this motion for a temporary injunction by order to show cause was submitted for signature to Mr. Justice Brown no action had as yet been started. Yet, in violation of law, the defendants submitted to Mr. Justice Brown and caused him to include in the said order to show cause which he signed, ex parte, the following paragraph:

> "and it is
>
> ORDERED, that the defendant Reverend Anacin W. Wilson, be and hereby is enjoined and restrained from continuing to act as pastor of the plaintiff church and from entering the property of the said church and from continuing services from the pulpit therein, pending the hearing herein, provided, and ordered,
>
> • • •
>
> • • • ".

That the defendants knew or should have known that pursuant to law no permanent injunction could be granted without a hearing. Not only did the aforesaid defendants take advantage of the defendant, Wilson in that case, they also took advantage of the plaintiff Ebenezer Baptist Church, Inc., here, and in addition thereto took advantage of the Court.

Tenth: That pursuant to the aforesaid conspiracy, the defendants individually and/or jointly, and/or severally failed and neglected to advise the Court at the time these papers were submitted and include in the complaint and the affidavit in support of the motion for a temporary injunction the fact that this plaintiff and Reverend Anderson W. Wilson had entered into a contract, in 1946, wherein the membership of the church had agreed to call Reverend Anderson W. Wilson as its pastor for life, and that on September 17, 1957 when the defendants commenced that action, the aforesaid contract of life was then in full force and effect, and had been for eleven years. That the failure by the defendants to advise the Court of that fact was, upon information and belief, wilful and intentional, and done with the purpose of hurting and injuring the plaintiff, its good name, its pastor, its reputation as a house of worship, and was done maliciously in order to destroy the plaintiff church corporation, the defendants knowing that by concealing that information from the Court, they could proceed in the manner that they were doing whereas if the Court had been advised of the life time contract, the defendants knew that they would first have to attempt to void the life time contract, which would have prevented the form

of proceeding which they took, and assisted them illegally, in their conspiracy and aim to destroy the church and its pastor as above set forth.

Eleventh: That pursuant to the aforesaid conspiracy, the defendants individually and/or jointly, and/or severally drew a complaint and verified the same in which they swore in paragraph Fifth thereof as follows:

> "FIFTH: That on or about the 10th day of September, 1957, a special meeting of the members of the Ebenezer Baptist Church Inc., was held at the premises of the said church located at 1110 Herkimer Street, Borough of Brooklyn, City of New York, at or about 8:00 P.M., and upon the majority vote of the membership, it was voted that the services of Reverend Anacin W. Wilson be dispensed with and that he be discharged as pastor of the said Ebenezer Baptist Church, Inc., and that he cease functioning as pastor thereof. That the said action of the membership was pursuant to custom and useage of the Ebenezer Baptist Church, Inc.
>
> SIXTH: That the said defendant was notified of a special meeting for the purpose of terminating his employment and the said defendant was present at the said meeting wherein the majority of the membership of Ebenezer Baptist Church Inc., voted to terminate his employment as pastor thereof.
>
> • • • ".

Twelfth: That the plaintiff is the Ebenezer Baptist Church, Inc., and at no time did it ever hold a corporate meeting on September 10, 1957 as alleged in paragraph Fifth and Sixth as above set forth, and at no time did the

Ebenezer Baptist Church Inc., in fact on the 10th day of September, 1957 through its membership vote to remove Reverend Wilson as its pastor. The allegation was false, wilful and malicious pursuant to the aforesaid conspiracy made by the defendants individually and/or jointly and/or severally for the purpose of destroying the plaintiff church corporation. The church corporation not only in fact never removed Reverend Wilson on September 10, 1957 as its pastor but in law didn't have the power to do so, and moreover, there was a life time contract between the church and its pastor in full force and effect on September 10, 1957.

Thirteenth: During the court of the proceedings in the action entitled Miles, et al., v. Wilson and so forth, the defendants' attorneys Ferziger and Penzig acting for and on behalf of the defendants [the Plaintiffs-Respondents herein], entered into a stipulation dictated by the Honorable Special Referee Meier Steinbrink on October 21, 1957 together with Pokorny, Schrenzel & Pokorny, the then attorneys for Anderson W. Wilson, the defendant [the Defendant-Appellant herein] in that action, the pertinent parts of which it was agreed by the attorneys and parties as follows: (Matter in brackets and underscoring ours)

> "13. It is further stipulated and agreed that the Court retains jurisdiction of this action and that in the event that it is necessary to interpret or enforce this stipulation or take any further action with reference to the case, then either party may apply to the Court upon three days notice to the other for such relief as to the Court may appear just and proper.
>
> 18. It is further agreed that the pulpit will be occupied from this time forth and for as many Sundays

as may be necessary until this controversy is resolved in accordance with this stipulation as follows: For the first Sunday the present pastor shall have the privilege of inviting a visiting minister to conduct morning services, and the Chairman of the Board of Deacons shall have the privilege of inviting a visiting minister to officiate at the afternoon services. Each succeeding Sunday thereafter there shall be rotation, in that on the second Sunday of this period by way of illustration, Deacon Miles shall have the privilege of inviting a minister to preside at the morning services, and Reverend Wilson shall invite one for the afternoon service.

19. It is further understood that both parties hereto will refrain from taking any action which might bring discredit on the church or create additional controversy, it being understood that all parties enter into this stipulation in good faith without mental reservation,

* * *."

On page 12 of the aforesaid stipulation of settlement dated October 21, 1957:

"The Special Referee: The plaintiffs Arbie R. Miles and Ed Brown and the defendant Anderson W. Wilson are present and have heard this stipulation.

* * *

* * *

The Special Referee: All right, 'agrees to,' and by agreeing to it he is restrained from doing it.

I think the check account should be subject to counter-signature by the two lawyers. They are both honorable men and I can trust them both.

Mr. Amchan: That is satisfactory.
Mr. Ferziger: Yes, satisfactory * * * "

Fourteenth: That pursuant to the conspiracy, and in violation of the stipulation of settlement agreed to by the defendants on October 21, 1957, as aforesaid, before the Honorable Meier Steinbrink, Special Referee, the defendants have collected and received illegally and in violation of law and in violation of the stipulation all of the monies collected in the church from on or about August 1, 1957 to the present time and continuing, and upon information and belief the defendants have misappropriated thousands of dollars belonging to the plaintiff church corporation, without accounting to it, without depositing the monies in the church corporation's bank account, and even in violation of the stipulation requiring that all monies be deposited in the church bank account, payments been made by check on the corporation bank account, the checks to be counter signed by the attorneys for the respective parties in the previous action pursuant to the aforesaid order. (Underscoring ours)

Fifteenth: That pursuant to the conspiracy the defendants, individually, and/or jointly, and/or severally, have in violation of the Penal Law and in violation of Section 19 of this stipulation of settlement dated October 21, 1957,

A. By disturbing religious services and religious meetings in the plaintiff's church on numerous occasions.

B. They have illegally changed the locks on the door in violation of law, in violation of the order of the Board of Trustees, and in violation of the aforesaid stipulation of settlement.

C. They have misappropriated the monies of the Sunday School, and have failed to account for same or deposit same in the church corporation's bank account as required by law. They have failed to have the checks counter signed by the attorneys pursuant to the aforesaid stipulation.

D. They have interrupted religious services in the church, actually stopping the religious service then in progress being conducted by the devotion leader, Mrs. India Wilson and Minnie Wiggins, removed them from the conduct of the religious service in violation of Sections 2070, 2071 and 2072 of the Penal Law, at the instigation, upon information and belief of Herbert Penzig who was then present at the Sunday Evening Services on Sunday, February 9, 1958.

E. The judgment entered in that action on December 30, 1957 by the Honorable Meier Steinbrink, Special Referee provided in part as follows:

> "ORDERED, ADJUDGED and DECREED that the aforesaid provision relating to the rotation of the ministers in the pulpit shall be for the said thirty (30) day period only and it is further
> * * * "

That on Thursday, February 6, 1958 the defendants Miles and Brown had their attorneys Solomon Ferziger and Herbert Penzig conduct a church meeting at the church on Thursday, February 6, 1958. At that time neither Ferziger nor Penzig were members of the church or Baptists, the plaintiff did not authorize, request or permit Ferziger and Penzig to conduct a meeting in its church that particular meeting. That at the said meeting in response to questions

as to whether Miles and Brown were to invite a minister to preach on Sunday, February 9, 1958, Ferziger and Penzig advised the people that the defendants would invite a minister and have a minister preach on Sunday. That this statement was made in spite of the knowledge of the defendants of the above provision of Judge Steinbrink's order, that the rotation of the ministers was to end on January 29, 1958, and in violation of the aforesaid judgment, the defendants did invite and did have a minister of their choosing against the knowledge, permission and consent of the plaintiff church corporation and the duly constituted official bodies of the church preaching on Sunday, February 9, 1958, at the morning service, and again at the evening service by breaking up the religious service then in progress as aforesaid. All in violation of the aforesaid judgment, in violation of the stipulation of settlement of October 21, 1957, in violation of law, and in violation of the customs and usages of the church. Moreover, on February 7, 1958 the attorneys for the plaintiff had sent a registered letter to the defendants advising them that their calculated action was in violation of the aforesaid stipulation of settlement, judgment and stay granted by the Appellate Division, but even in spite of that notice, the defendants in order to destroy the church, ruin its reputation, cause it to split asunder, did the acts complained of as above set forth.

F. The defendants on February 6, 1958 called a meeting for Wednesday, February 12, 1958 in the church and again on Sunday February 9, 1958 called a meeting in the church for February 19, 1958. At the time these meetings were announced, the purpose of the meetings were not announced.

it was not announced whether it would be a Board of Trustees meeting a Deacon meeting, a church meeting or a church corporation meeting. The plaintiff and its duly constituted official bodies at no time authorized the defendants to call these meetings. The calls were unauthorized, illegal and void. They were called solely for the purpose of violating paragraph 19 of the stipulation of settlement of October 21, 1957 with the avowed purpose on the part of the defendants to bring discredit on the plaintiff and create additional controversy, all in violation of law.

G. That the defendants, pursuant to the conspiracy, either individually, jointly or severally announced through Ferziger and Penzig that Ferziger and Penzig were going to prepare by-laws and were going to elect trustees and deacons. That all of these arrangements were not authorized by the plaintiff. These arrangements were made in the church by Ferziger and Penzig with out the knowledge, permission or consent of the plaintiff, against its wishes in violation of the stipulation of settlement dated October 21, 1957, and the judgment of December 30, 1957. (Underscoring ours)

Sixteenth: That the said defendants threatened to continue to defy the plaintiff, its Board of Trustees, its membership, the laws of the State of New York, the canons, customs and useages of the church, and to continue on disturbing the religious services, calling illegal meetings, misappropriated the church funds, misappropriated Sunday School funds, desecrate the sanctity of the church, hold the plaintiff up to obloquy and scorn and ridicule and

seriously interfere with the sacred work in which the plaintiff is engaged.

Seventeenth: That the plantiff has duly authorized the commencement and prosecution of this action.

Eighteenth: That the plaintiff has no adequate remedy at law for the wrongs threatened to be done and done by the defendants, as aforesaid.

AS AND FOR A SECOND CAUSE OF ACTION

Nineteenth: Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs "First" through "Eighteenth" with the same force and effect as though fully set forth herein verbatim.

Twentieth: That by reason of all the foregoing, the plaintiff has suffered damages in the sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars.

WHEREFORE, Plaintiff demands judgment against the defendants on the first cause of action that the defendants be forever enjoined

1. From disturbing religious services.

2. From illegally calling or holding religious meetings without the permission, knowledge and consent of the plaintiff.

3. From disturbing religious meetings.

4. From causing riots and disturbance in front of the church by changing the locks on the church door without

the knowledge, permission or consent of the plaintiff and in violation of law.

5. From misappropriating church monies.

6. From misappropriating Sunday School monies.

7. From violating the stipulation of settlement dated October 21, 1957 in Miles v. Wilson as aforesaid.

8. From violating the judgment dated December 30, 1957 in so far as they have continued to invite ministers to the church after January 29, 1958 in violation of the stipulation dated October 21, 1957, the judgment dated December 30, 1957, against the wishes of the plaintiff and its duly constituted official bodies, and in violation of law. (Underscoring ours)

9. From illegally preparing by-laws against the knowledge and consent of the plaintiff.

10. From illegally calling Board of Trustees meetings and Board of Deacons meetings in violation of the stipulation dated October 21, 1957 against the plaintiff's wishes and in violation of law, and restraining the defendants from electing Board of Trustees and Board of Deacons in violation of law, in violation of the stipulation of settlement dated October 21, 1957 and against the knowledge, permission and consent of the plaintiff.

11. That they be forever enjoined from interfering and interrupting the plaintiff in conducting divine worship, or other religious work in which it is engaged, and that the plaintiff have such other, further relief as may be just against the defendants besides the costs of this action.

Appendix "E"—Verified Complaint

AS TO THE SECOND CAUSE OF ACTION

WHEREFORE, plaintiff demands judgment against the defendants on the second cause of action in the sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars for damages sustained by the plaintiff, together with the costs and disbursements of this action.

Dated: New York, February 15, 1958.

Yours, etc.,

SNITOW & SNITOW
Attorneys for the Plaintiff
Office & P. O. Address
152 West 42nd Street
New York, N. Y.

STATE OF NEW YORK
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK

INDIA WILSON, being duly sworn, deposes and says that she is a member of the Board of Trustees in the within action; that she has read the foregoing verified complaint and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

/s/ INDIA WILSON

Sworn to before me this
15th day of February, 1958

JULIUS ROSEMAN
Commission of Deeds, City of New York
New York County Clerk's No. 51
Commission Expires Sept. 24, 1959

LE COPY

Office-Supreme Court, U.S.
FILED
MAY 20 1959
JAMES R. BROWNING, Clerk

No. 829

IN THE

Supreme Court of the United States

ARBIE R. MILES and ED BROWN, individually and as deacons, trustees and members of EBENEZER BAPTIST CHURCH INC., and EBENEZER BAPTIST CHURCH INC.,

Plaintiffs-Respondents,

against

ANDERSON W. WILSON, individually and as Pastor of EBENEZER BAPTIST CHURCH INC.,

Defendant-Appellant.

REPLY BRIEF FOR ANDERSON W. WILSON INDIVIDUALLY AND AS PASTOR OF THE EBENEZER BAPTIST CHURCH INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SNITOW & SNITOW,
Attorneys for the Defendant-Appellant,
152 West 42nd Street,
New York, N. Y.

INDEX

Cases Cited

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IN THE

Supreme Court of the United States

ARBIE R. MILES and ED BROWN, individually and as deacons, trustees and members of EBENEZER BAPTIST CHURCH INC., and EBENEZER BAPTIST CHURCH INC.,

Plaintiffs-Respondents,

against

ANDERSON W. WILSON, individually and as Pastor of EBENEZER BAPTIST CHURCH INC.,

Defendant-Appellant.

REPLY BRIEF FOR ANDERSON W. WILSON INDIVIDUALLY AND AS PASTOR OF THE EBENEZER BAPTIST CHURCH INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

On page 11 of the respondents' brief, there appears the nub of this case, in these words:

> "• • • In connection therewith, there is a specific finding by the Special Referee that under the proof adduced there was no ecclesiastical judicatory which could pass upon questions at issue in the instant case (1992) • • •"

Folio 1992 is part of the Referee's findings, where the Referee stated the law to be as follows:

> "These folks have the right in a religious society to decide these matters themselves, and when I say that I am not dealing with any ecclesiastical questions, for the very simple reason that the civil court never

interferes with ecclesiastical questions where there is ecclesiastical control or an ecclesiastical judicatory * * *"

Obviously, then, the Referee erred, in not realizing that in Baptist Churches, such as the Ebenezer Baptist Church, there is a highest judicatory, there is an ecclesiastical judicatory, and that is the majority of the membership (*Walker Memorial Baptist Church* v. *Saunders*, 285 N. Y. 462).

In other words, it is quite clear from the Referee's decision as he continues on in folio 1992 that if there had been, in his opinion, an ecclesiastical control or an ecclesiastical judicatory in this case, then civil courts, and particularly he, would have had no jurisdiction to excommunicate the fourteen members of the church, or to deprive them of their right to vote in an ecclesiastical matter, to wit, the dismissal of their minister, firstly from his pulpit and secondly from his lifetime contract.

On page 9 of the respondents' brief:

"* * * The Special Referee referred to some of the persons who voted: '* * * As an attempt to stuff the ballot box' (106)."

On page 10 the respondents say:

"There is no doubt that he had a pre-devised scheme in his mind to stuff the ballot box and thereby felt he could never be defeated at an election."

In that regard at folio 102, the Referee excommunicated fourteen members, and he points out that two of them had left the Ebenezer Baptist Church and had joined the Disciples of Christ, and the other ten he pointed out were children who he claimed did not have sufficient understanding, with respect to the questions voted upon. See folios 102, 103, 104 and 105.

In folio 106 the Referee refers to some of the Reverends who testified as an attempt to stuff the ballot box. Of the fourteen that he disqualified John M. Lawton and James Tate were ministers, and both of them testified that they were members of the church as did the other twelve.

I point this out because the respondents try to give the impression that fourteen ringers were brought in for the purpose of helping the minister win the election. The testimony shows and the Referee's decision shows that all fourteen were members, who the Referee excommunicated but the church never did.

The important point in this case, from the standpoint of this Court is that only the church could excommunicate these fourteen members. If these ten children didn't have sufficient understanding to decide whether or not they wanted Rev. Wilson to remain as their pastor that was for the majority of the members of the church to excommunicate these 10 children, not for the civil court.

If O. C. Barden and Connie May Barden had left the Ebenezer Baptist Church and had joined the Disciples of Christ, that was a religious question and the question as to whether they would be excommunicated and disqualified was for the church to decide. Until the church excommunicated them, they were members of the church, as appellant's brief heretofore submitted to this Court, clearly shows and it was not for the Referee to determine the ecclesiastical question.

With regard to his excommunication of the two ministers whose voting the Referee described as an attempt to stuff the ballot box, that is a very interesting question. The experts who testified on behalf of the appellant that it is common practice in the Baptist Faith for Baptist ministers to pastor one church and be members of another church stands wholly uncontradicted in the record.

Moreover, according to the experts' testimony, dismission from membership or excommunication from membership could only be by death or action of the membership (fols. 346, 347, 370, 321, 388, 269).

This testimony stand wholly uncontradicted in the record.

The experts testified that with regard to the right to vote on ecclesiastical matters, age made no difference. (fols. 322, 323, 370, 277 377).

I point this out only to show that these fourteen people testified that they were members, the books and records of the church show they were members, and not only Hiscox, but the experts' testimony was that on all ecclesiastical matters all persons who are members, could vote irrespective of age, and once a person became a member he could only lose his membership by death or by excommunication by vote of the membership.

Incidentally, it should be called to the attention of the Court that Dr. Gardner Taylor who testified as an expert on behalf of the appellant is the President of the Protestant Council of the State of New York, at the present time. It is also important to note that Reverend Dr. Sandy Ray who testified as an expert on behalf of the appellant is the President of the Empire State Baptist Convention of the State of New York, consisting of every Negro Baptist Church in the State of New York.

In arguing in favor of the constitutionality of the court's excommunicating these fourteen members, and depriving them of the right to vote, the respondents rely upon paragraph thirteeen of the stipulation of settlement. We also rely on paragraph thirteen of the stipulation, and we challenge the respondents to point out anything in paragraph thirteen of the stipulation appearing on page 7 of the respondents' brief, wherein the appellant agreed to waive any constitutional rights.

Of course, there isn't any such waiver by him whatever, and it is quite clear, that in order for a person to waive constitutional rights, that waiver must be very specifically set out in the agreement. There is no such waiver of constitutional rights whatever, contained in paragraph thirteen; and this was pointed out by the Presiding Judge Nolan in the Appellate Division in his dissenting opinion.

Moreover, the minister could only waive his own personal rights. The question of excommunicating members of the church and depriving them of the right to vote could only be waived by the majority of the congregation, the highest ecclesiastical body, who is not a party to this action, and it never waived its constitutional right to make that determination by itself for its members, particularly the fourteen that the civil court excommunicated.

On page 10, the respondents rely on the testimony of Mr. Amcham at folio 1727 that when the votes were challenged, it would be put in a separate envelope and left for the Referee to determine.

In the first place, what Mr. Amcham agreed to is not in the stipulation, as a whole or in paragraph thirteen thereof particularly (fols. 186-190).

Furthermore, an attorney is an agent. There is no proof in this record that his principal, the appellant, ever agreed to be bound by this. In any event, Mr. Amcham could possibly bind the appellant, if the proper foundation had been laid to that effect, which it was not, but certainly Mr. Amcham could not bind the Ebenezer Baptist Church, the spiritual body, not a party to this action, and who he did not represent.

In Point I, the respondents argue on page 12 that the constitutional question was not timely raised. They then go on to admit that it was raised in the answer in the Supreme Court, and it was raised as a point in the Appellate Division and in the Court of Appeals.

But then they go on to argue that the four affirmative defenses raised in the answer were waived by the stipulation of settlement entered into before the learned Special Referee.

That there is no merit to this contention appears by the very judgment appealed from which recites that the judgment is based upon

> "And an answer thereto having been interposed by Anderson W. Wilson, individually and as pastor of the Ebenezer Baptist Church Inc., sued herein as Anacin W. Wilson, individually and as pastor of the Ebenezer Baptist Church" (fols. 125 and 126),

which judgment has been affirmed by the Appellate Division and the Court of Appeals and is now before this Court, so that it is quite clear that this answer is very much part of the case as is the constitutional question raised in the affirmative defenses in the answer by the appellant.

Point II on page 13 of the respondents' brief begs the constitutional question. I have already pointed out that even the Referee's decision and judgment makes no claim that these fourteen persons were non members, but we have pointed out through the decision that they were all members who were excommunicated by the Referee for the reasons that he recited in his decision as above set forth. Not only that, but it begs the question because the constitutional question is that it was for the ecclesiastical court and not the civil court to determine whether these people were members or non members or whether they had the right to vote or not to vote.

With regard to the *Mallory* case, we have already shown that Reverend Wilson did not stipulate or waive statutory and constitutional rights and that the only one that could was the Ebenezer Baptist Church, the spiritual body,

not a party to this action. With regard to the *Moss* case the same argument is true, but in addition thereto if such an agreement had been made it would definitely be unreasonable, it would definitely be against good morals, it definitely would be against sound public policy, because it would mean that from here on in, civil courts would have to run every church and synagogue in this country, and/or tell every church and synagogue in this country how it should be run.

Obviously, if this was not against good sound policy, neither the Congress nor the Legislature of the State of New York would have constitutionally forbade such action.

It is quite elementary that individuals may not stipulate to end separation of church and state in this country.

On page 14, the respondents argue that

> "* * * Because it was found necessary to challenge numerous ballots pursuant to Section 13 of the Stipulation (188) * * *"

it is respectfully submitted that Section 13 did not envision or authorize or even mentipn the right to challenge ballots, and there is no evidence in the stipulation of settlement that the parties envisioned any challenge to the voters, because it was specifically stated in paragraph fifteen of the stipulation of settlement (fols. 186-190) that only the persons entitled to vote at a meeting of the Board of Deacons or a stated meeting of the church society or congregation shall be those members who were such on September 10th, 1957, and the records of the church, and the testimony was that all fourteen of those members who were excommunicated were members of the church on September 10, 1957.

While Reverend Wilson could not have bound the Ebenezer Baptist Church, the spiritual body, not a party to the action, in any event, as to the excommunication of

members of their right to vote, before the respondents could make the arguments that they have made with respect to waiver by Reverend Wilson, paragraph 13 would have had to contain language to the effect or similar language that if a question of challenged votes came up that a civil court could determine that question and take it away from the ecclesiastical court, but it doesn't say anything of the kind, and when the matter on motion of the respondents was referred back to Special Referee to determine these challenges, it was the duty of the Referee to refer the challenges to the ecclesiastical body, to determine.

On page 15 of the respondents' brief, it is stated:

> "And what everybody was conceding to be the church involved whether it be in a corporate form or in an unincorporated form."

That is begging the question. Reverend Wilson had no more right to bind the Ebenezer Baptist Church, the unincorporated association, not a party to the action than did the respondents, because that is governed by Sections 12 and 13 of the General Associations Law of the State of New York.

Nobody could concede the church was involved, because under the law of the State of New York the only way that you could get the church involved was to serve the president and secretary, or in the case of the Ebenezer Baptist Church the pastor or the secretary of the church, and concededly this was never done.

On page 16 the respondents quote the case of *Quicker-Berner* v. *Macy*, 250 N. Y. 341, and recites the language therefrom:

> "The court having jurisdiction of the persons and of the subject matter of the dispute passes on nothing else. • • •"

The appellant relies on this case and on this point too, for it is exactly his point, to wit, that the court had no jurisdiction of the Ebenezer Baptist Church, the unincorporated association, and it had no jurisdiction of the subject matter since it had no constitutional right to determine the qualification of these fourteen voters and excommunicate them from voting. On page 17 the respondents charged that the appellant destroyed the by-laws (fol. 119).

On page 26 of the appellant's brief submitted to this Court there has already been pointed out that in response to the Referee's question, the respondents' attorney admitted at folio 161 that

"Mr. Ferziger: There are no by-laws".

The respondents then go on to say that the appellant tampered with the church records and never produced the books and records of the church. The fact of the matter is that the appellant produced at least six big fat church record books, all of which were marked either in evidence or for identification during the trial, and they are still in the possession of the court.

At page 17 the respondents keep emphasizing that none of the 14 (who were excommunicated) were ever members of the church and were brought in as "ringers". Even the Referee made no such rash statement except as to the two ministers, and the respondents failed to cite even one folio with regard to their alleged non membership. On the other hand, in the appellant's brief twenty or more folios were cited to show that these fourteen people testified that they were members of the Ebenezer Baptist Church and that they had never been dismissed therefrom by the membership.

On page 18 the respondents argue that Judge Steinbrink did not pass upon any ecclesiastical questions in this case and then cites as authority for that proposition the

case of *Rector* v. *Melish*, 301 N. Y. 679, certiorari denied 340 U. S. 936, and they claim that this Court refused certiorari and held that no ecclesiastical questions were passed upon.

The case of *Rector* v. *Melish* was exactly the contrary. Dr. Melish had been removed by the highest ecclesiastical judicatory, to wit, Bishop DeWolfe, the presiding Bishop of Dr. Melish's church for the district covering Brooklyn and Long Island, and it was for that reason that this Court refused certiorari.

On pages 18 and 19 the respondents talk about the by-laws of the church. It is quite obvious that before the respondents went to trial they discussed the question of by-laws with their attorneys. Does it make sense that if there had in fact been by-laws in this church, that the appellant, a man of God, would deny it. Does it make sense that if there were by-laws in this church that the respondents' attorney at the very beginning of the trial would tell the Referee that there weren't any by-laws, in a direct answer to a direct question, without any reservation or qualification of any kind whatever, as the respondents now try to imply in their present brief. Moreover, each of the witnesses for the respondents described the by-laws differently insofar as its size and shape was concerned. Moreover, if there had in fact been by-laws, the evidence on the trial was that Ed Brown, one of the respondents, was away from the church for a year, before the voting took place, and if in fact, it were true, that there were by-laws, and if in fact, it were true, that if a person fails to attend three communions for three months or failed, to pay dues for six months he is automatically dismissed, Ed Brown would not have been eligible to bring this case or to have voted, and there were many other people who testified against Reverend Wilson who were in the same category as Ed Brown, but who were not challenged because there were no such by-laws.

Furthermore, such a by-law if there was one would be illegal because both Hiscox and the experts testified that under Baptist Church Law the only way that a member could be dismissed from membership was by the vote of the membership at a duly called and held meeting, and no church would pass a law, obviously, which was against the rules, regulations, customs and usages of the Baptist Church.

Furthermore, the testimony with respect to Miles, the other plaintiff, was that he hadn't attended for communion for more than three months before the vote was taken, so that he was not a member in good standing, and he had no right to bring this action if both the appellant and the respondents' counsel are to be disbelieved.

It is quite clear that the respondents were trying this case "by ear", when they saw they had no case, that their complaint on its face did not state a cause of action, it is quite obvious that somebody got up this "brilliant" idea of trying to make out a case where there wasn't any case, and after the attorney for the respondents admitted that there was no by-laws, the respondents for the first time started to try to prove there was. Furthermore, there is no proof in this record that by-laws were ever subpoenaed so that secondary evidence of same could be given. Without laying a proper foundation, it is quite clear that there was no grounds for secondary evidence.

Moreover, even if the appellant's testimony and that of their witnesses and that of the respondents' attorney was to be disbelieved, the by-laws made no reference to children or depriving children of the right to vote or depriving children of their membership in the church, there was nothing in there that was shown or proven in any alleged by-laws that said that a minister may not be the pastor of another church and the minister of the Ebenezer Baptist Church Inc., and there is no testimony that because two of the people left Ebenezer and joined other churches that they automatically gave up their membership in Ebenezer.

On the other hand the record stands uncontradicted both through Hiscox and the experts, that children of all ages, once members, were entitled to vote on ecclesiastical questions. That the only way one could be deprived of membership is by death or by vote of the membership so that the two people who left the church to join another church and the two ministers who pastored another church clearly were members, and most important of all only the ecclesiastical body could deprive these fourteen people of their membership and never did so, according to the proof in this case.

On page 19 the respondents say the learned Special Referee was absolutely correct in refusing to give any credence or honor to the votes of the children, and then on page 20 that the language to the effect that they were children of tender age was not the basis of the learned Special Referee's findings of fact.

How reckless and how careless can these respondents be, in the light of folios 102 through 105. The majority opinion in the Appellate Division and in the Court of Appeals failed to write an opinion. But Exhibit E attached to appellant's brief shows the dissenting opinion at pages 40 and 41, discusses in detail each of the fourteen excommunicated members and the reasons for their dismissal. and Presiding Justice Nolan discusses the illegality of the Referee disqualifying some of the voters because of their age, and how the respondents could be so rash and careless with the facts in the record is difficult to perceive. On page 21, the respondents point out that on page 3 of the petitioner's brief the statement is made that the petitioner is an officer of the church, the spiritual body and not an officer of the corporation. That referred to the fact that the appellant was only being sued in this case individually and as pastor of the Ebenezer Baptist Church Inc. He was never sued as chairman of the Board of Trustees, and this case involved his removal as the pastor of the spiritual body, and had no application to his corporate capacity.

On page 22, the respondents admit for the first time in this Court, because they never admitted it in the Appellate Division or in the Court of Appeals, that the Referee gave the wrong reasons for his decision, but that his decision was correct. In effect, what the respondents are saying now is that even though the Referee may have given the wrong reason for excommunicating the fourteen voters, because they were children, the decision was a correct one.

The appellant is happy to know that the respondents admit that the Referee erred and that his reasoning was wrong.

On page 22 the respondents argue that they don't have to discuss the cases cited by the appellant, and that the law expounded by those cases are not disputed. They claim that these cases, however, are not apropos.

It is quite strange, however, that the respondents have not been able to submit to this Court even one case to uphold the Referee's decision, even if his reasons are admittedly wrong.

On page 23 it is contended that the Ebenezer Baptist Church does not have a high judicatory and the right to vote in the church is controlled by by-laws. These contentions are absolutely false for the reason that the Referee himself admits that the Ebenezer Baptist Church is independent and governed by the majority of its membership in the following language at folio 107:

> "These folks had the right in the religious society to decide these matters themselves, and when I say that I am not dealing with any ecclesiastical question, for the very simple reason that civil courts never interfere with ecclesiastical questions where there is ecclesiastical control or an ecclesiastical judicatory. * * *"

That a Baptish Church has a highest ecclesiastical judicatory in the majority of its membership was held to be

the law by the Court of Appeals in *Walker Memorial Baptist Church* v. *Saunders*, 285 N. Y. 462.

By the same token the right to vote in the church is controlled by the majority of the membership and only by the majority of the membership, and this was so held to be the law of the State of New York in *Walker Memorial Baptist Church* v. *Saunders*, in a case very similar to the case at bar, in that it involved dismissal of a Baptist Minister of a Baptist Church.

On page 24, the respondents say:

> "As pointed out above, the church in question was not part of a system that had an appellate judicature such as the Roman Catholic Church. Each church is a separate and independent unit whether Congregational, Baptist or Jewish."

This statement shows very clearly that the respondents are either being very naive or very ignorant.

It is a matter of common knowledge to anyone having knowledge of church law, that a church is either governed by higher echelons such as in the Catholic Church, Pope, Cardinal, Archbishop, Bishop, etc., or the Protestant Episcopal Church by Presiding Bishops, or they are governed by the majority of their membership such as in the Baptist Church or the Jewish Synagogues.

In either case, the highest judicatory is either the highest ranking ecclesiastical officer in the particular church, or it is the majority of the membership. On page 25 the respondents refer to a subsequent action which is not part of this record. Clearly this is illegal and not permissible but lest the Court be misled, when the stipulation of settlement was made at folio 195, the Referee said:

> "I think the check account should be subject to counter signature by the two lawyers. They are both honorable men and I can trust them both.

Mr. Amcham: 'That is satisfactory.
Mr. Ferziger: Yes, satisfactory.'' (195, 196)

It seems that from September of 1957 until March or April of 1958 the respondents violated that stipulation by collecting the moneys every Sunday in the church by force and violence, and instead of turning it over to the board of trustees, pursuant to Section 5 of the Religious Corporations Law, they brought it to their attorneys' office each and every week, without accounting for the said moneys to the board of trustees or to the church corporation pursuant to Section 5 of the Religious Corporations Law.

As a result, an action was started pursuant to resolution of the board of trustees in the name of the Ebenezer Baptist Church Inc., against Miles and Brown for an accounting, and Referee Steinbrink himself, over the vigorous opposition of the respondents in this action, the defendants in that action appointed a Conservator, or Receiver, and when they failed to account for the moneys to the Conservator, the Conservator made an application for an accounting which was granted, by Mr. Justice Steinbrink about two months ago, shortly before dismissing the complaint, only because it was contended that the action was not authorized by the corporation, which is now the subject of an appeal in that action. Other than that stipulation we have never proceeded to enforce the judgment but have always contended that same was void and unconstitutional.

Lastly, it ought to be pointed out that at folio 91 the Referee changes the entire theory of the case and the parties to the litigation after the entire case is in. This is done in the following manner at folios 90 and 91:

"• • • the plaintiffs are Arbie R. Miles and Ed Brown, individually and as deacons, trustees and members of the Ebenezer Baptist Church and Ebenezer Baptist

Church Inc. against Anacin W. Wilson, individually and as pastor of *dash* it says Ebenezer Baptist Church Inc. I pause here to observe that there can be no pastor of a corporation. That is evidently a typographical or stenographic error."

When you read folios 90 and 91 in relation to folios 15, 16 and 17, referring to paragraphs Fifth and Sixth of the complaint, where the plaintiffs allege that the pastor was removed by the majority of the members of the corporation rather than by the members of the church which was strictly in violation of *Walker Memorial Baptist Church v. Saunders*, 285 N. Y. 462.

It is also in line with the thinking of the respondents when they say to this Court that the Ebenezer Baptist Church does not have a highest judicatory in the vote of the majority of its members.

Folios 107 and 108 show the Referee's error in this case is strictly a constitutional question because that error is solely based on the fact that the Referee didn't realize that the question of the right of church members to vote at church meetings, and the excommunication of members, and the call of and the dismissal of a pastor were all purely ecclesiastical questions.

The Referee's dilemma and his inconsistency is pointed up at folio 113 where he says:

"With reference to the body of some of the things stated by Hiscox it may well be that what he stated were his opinions which should govern these Baptist churches, each one of which is autonomous. They are on congregational lines, the same as the Protestant Episcopal Church and the same as synagogues of the Jewish faith. There is nothing above them to control or guide them, excepting the Almighty God."

With regard to the first sentence, the Referee's opinion conflicts with the Court of Appeals with regard to Hiscox. (See *Walker Memorial Baptist Church* v. *Saunders*, *supra*.)

His next sentence that Baptist churches are on congregational lines the same as the Protestant Episcopal Church is incorrect. The Protestant Episcopal Church is governed by a higher judicatory, a presiding Bishop. A Baptist Church is governed solely by the vote of the majority of its members.

With regard to the last sentence of the above quote if there is nothing above them to control or guide them, excepting the Almighty God, then by what right or power did the Referee have to determine the qualification of membership, and excommunicate these fourteen voters, especially where the appellant had won the vote before the Honest Ballot Association, if these voters had not been excommunicated. Again at folio 114 the Referee shows that the civil court will not be governed by ecclesiastical courts or ecclesiastical law as to ecclesiastical matters, or even by the Court of Appeals. For example he points out that Hiscox, Note 14 on page 79 says that all members shall have equal rights and immunities without distinction of sex, age or condition. The five experts testified to the same effect without contradiction in this record. The Court of Appeals so held in *Walker Memorial Baptist Church* case. But that did not deter the Referee. He says:

> "That may very well be with regard to worship, but I absolutely decline to hold that that applies to elections or voting such as we have had in this case, for the very simple reason, as I have already pointed out, that some of these children were of a very low order of intelligence and didn't even know the meaning of the words on the ballots on which they pretended to vote."

CONCLUSION

For all the reasons set forth in the appellant's brief in chief, and now in this reply brief, it is respectfully submitted that the petition for writ of certiorari should be in all respects granted.

Dated: New York, May 15, 1959.

SNITOW & SNITOW,
Attorneys for the Defendant-Appellant.

On the brief:

SYDNEY SNITOW, Esq.

and

MELVEL W. SNITOW, Esq.